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Nos. 84-325 & 84-356

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

METROPOLITAN LIFE INSURANCE COMPANY,
Appellant,
v.
COMMONWEALTH OF MASSACHUSETTS,
Appellee.

TRAVELERS INSURANCE COMPANY,
Appellant,
v.
COMMONWEALTH OF MASSACHUSETTS,
Appellee.

On Appeal from the Supreme Judicial Court for the Commonwealth of Massachusetts

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BRIEF FOR THE AMERICAN PSYCHOLOGICAL ASSOCIATION, THE ASSOCIATION FOR THE ADVANCEMENT OF PSYCHOLOGY, AND THE MASSACHUSETTS PSYCHOLOGICAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE.

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INTEREST OF *AMICI CURIAE*

The American Psychological Association (APA) is a voluntary nonprofit, scientific, and professional organization with more than 60,000 members. It has been the major association of psychologists in the United States since 1892. The APA's purpose, as reflected in its bylaws, is to "advance psychology as a science and profession, and as a means of promoting human welfare."

The Association for the Advancement of Psychology (AAP) is a nonprofit corporation supported by the voluntary contributions of 6,000 psychologists. AAP seeks to inform the three branches of government of the ethical, professional, and scientific views of the psychological community.

The Massachusetts Psychological Association, with over 1650 members, is a state affiliate of the APA. It represents the scientific and professional interests of psychologists within Massachusetts, including psychologists working in academic and professional settings, both in public and private institutions.

Amici file this brief pursuant to Rule 36.2 of the Rules of this Court. The parties have consented to the filing of the brief; their consents have been filed with the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1973, the Massachusetts legislature enacted an insurance statute requiring all group health insurance policies to provide specified coverage for mental health benefits. *See* Mass. Ann. Laws ch. 175, § 47B (Michie/Law. Co-op. 1977) (Section 47B). The Massachusetts Supreme Judicial Court—properly in the view of *amici*—rejected appellants' arguments that this statute is preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*, and by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.*

Although Section 47B arguably relates to employee benefit plans and therefore falls within the scope of ERISA's preemption provision, it is excepted from preemption by ERISA's insurance savings clause, which was meant to preserve the long line of state statutes, includ-

ing Section 47B, that regulate the contents of insurance policies. The one exception to the insurance savings clause, which prohibits States from deeming employee benefit plans to be insurers, does not apply to Section 47B, which regulates only insurance companies.

The decision below is additionally supported by the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, which represents Congress' judgment that, as a matter of federal policy, insurance regulation should be performed by the States.

This case does not involve a conflict between Section 47B and ERISA, as appellants would have this Court believe. Rather, any conflict that does exist is between ERISA and the McCarran-Ferguson Act. For this reason, this Court's usual reluctance to weigh conflicting policy considerations is particularly appropriate here.

ARGUMENT

I. ERISA WAS NOT INTENDED TO PREEMPT MANDATED BENEFIT STATUTES.

ERISA's preemption provision, § 514(a), 29 U.S.C. § 1144(a), provides that the Act "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title."

There is no question that the benefit plans at issue here are "employee benefit plans" as defined in 29 U.S.C. § 1003. The only issues are whether Section 47B "relates to" employee benefit plans within the meaning of § 1144, and, if so, whether the statute falls within one of the express exceptions to § 1144.

A. Arguably, the Massachusetts Statute "Relates to" Employee Benefit Plans Governed by ERISA.

In *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), the Court held that ERISA preempted a state statute prohibiting the reduction of a retiree's pension benefits by the amount of workers' compensation awards

the retiree received subsequent to retirement. After finding that Congress had actually contemplated and approved such an offset of pension benefits, the Court concluded that the statute " 'relate[s] to pension plans' governed by ERISA because it eliminates one method for calculating pension benefits . . . permitted by federal law." *Id.* at 524.

The Court's conclusion was not altered by the fact that the statute "intrudes indirectly, through a workers' compensation law rather than directly, through a statute called 'pension regulation.' " *Id.* at 525. Rather, the Court concluded that "even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern." *Id.*

Then, in *Shaw v. Delta Air Lines, Inc.*, 103 S. Ct. 2890 (1983), the Court held that the New York Human Rights Law and the State's Disability Benefits Law "related to" pension plans governed by ERISA. The Court reasoned that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Id.* at 2900. Applying this definition, the Court concluded that "the Human Rights Law, which prohibits employers from structuring their employee benefit plans in a manner that discriminates on the basis of pregnancy, and the Disability Benefits Law, which requires employers to pay employees specific benefits, clearly 'relate to' benefit plans." *Id.*

ERISA does not specify which benefits must be included in employee benefit plans. Accordingly, Section 47B does not conflict with any provision of ERISA so as to "relate to" benefit plans in the sense in which that term was used in *Alessi*. But *Alessi* does suggest that the fact that the mandated benefit statute is nominally an insurance law, rather than a benefits plan law—and therefore bears on benefit plans only indirectly—would not save the Massachusetts statute from preemption under ERISA.[1] And be-

[1] Although Section 47B does require employee benefit plans to provide the mental health benefits specified in the statute, there has

cause Section 47B does require that insurance policies issued to benefit plans provide specified mental health benefits, it arguably "relates to" those employee benefit plans just as the Disability Benefits Law did in *Shaw.*

The Massachusetts statute can, however, be distinguished from the New York laws at issue in *Shaw.* New York's Human Rights Law had been interpreted by the state courts to prohibit *any* employer from maintaining an employee benefit plan that treated pregnancy differently from other nonoccupational disabilities. *See* 103 S. Ct. at 2895. The Disability Benefits Law expressly required *all* employers to provide the same benefits for pregnancy-related disabilities as for any other disability. *See id.* at 2896. The Massachusetts statute, by contrast, requires that mental health benefits be provided to only certain employees—those whose benefit plan is covered by an insurance policy. The statute thus "relates to" only those employee benefit plans, and not to benefit plans generally. Arguably, the statute's indirect relation to only a subset of employee benefit plans governed by ERISA takes it outside the scope of the preemption provision.

Most of the courts that have considered ERISA's effect on mandated benefit statutes have, however, concluded that such statutes do "relate to" employee benefit plans governed by ERISA.[2] Accordingly, although the point is

been no attempt to enforce Section 47B against employee benefit plans and the Commonwealth apparently concedes that that part of the statute is preempted by ERISA. The Massachusetts Supreme Judicial Court, relying on state law, found that the portion of Section 47B applicable to employee benefit plans was severable from the portion applicable to insurance policies. *See Attorney General v. Travelers Ins. Co.*, 385 Mass. 598, 601, 433 N.E.2d 1223, 1225 (1982), *reprinted in* App. to Juris. Stmts. at 13a, 15a-16a. This state law ruling is binding on this Court; accordingly, the only question before the Court is the effect of ERISA on the portion of Section 47B regulating insurance policies.

[2] *See, e.g., Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323, 329 (2d Cir. 1982), *aff'd mem.*, 103 S. Ct. 3564 (1983); *Standard Oil Co. v. Agsalud*, 633 F.2d 760, 766 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981); *Wadsworth v. Whaland*, 562 F.2d 70, 77 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978).

not free from doubt, *amici* will assume here that Section 47B does "relate to" employee benefit plans.

B. The Massachusetts Statute Is a Law Regulating Insurance and Is Therefore Excepted from ERISA's Preemption Provision.

Even if Section 47B "relates to" employee benefit plans within the terms of the ERISA preemption provision, the statute is not preempted if it falls within one of the express exceptions to the reach of the preemption provision. The relevant exception here, the so-called insurance savings clause, is set forth in 29 U.S.C. § 1144(b)(2)(A):

> "Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance . . . ."

This Court's prior decisions are of little assistance in determining whether Section 47B is a law which regulates insurance within the meaning of this savings clause. In both cases, the Court noted that state laws regulating insurance are excepted from ERISA's broad preemption provision.[3] But the insurance savings clause was not at issue in either case, and therefore the Court did not elaborate on the reach of that provision. In fact, the Court made clear in *Alessi* that it was not ruling on the applicability of ERISA's preemption provision in cases such as this. *See* 451 U.S. at 525 n. 21.

Congress' intent in excepting state laws regulating insurance from the scope of the ERISA preemption provision cannot be determined from the language of that statute. Nowhere in ERISA does Congress define the phrase "law . . . which regulates insurance" or give any clue to its meaning. But it should be noted that Congress used very broad language in the insurance savings clause: it preserves "*any* law of *any* State which regulates insurance . . . ." (Emphasis added.)

[3] *See Shaw v. Delta Air Lines, Inc.*, 103 S. Ct. 2890, 2897 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 n. 19 (1981).

The legislative history does not address the scope of the insurance savings clause. Until the ERISA bill emerged from confererence, every prior version of the preemption provision had superseded state law only in the specific areas regulated by ERISA. The Conference Committee broadened the preemption provision to include all state laws that relate to pension plans, rather than only those dealing with subjects regulated by ERISA, but the Committee did not comment on the reasons for the change. *See* H.R. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5162. With respect to the insurance savings clause, the Conference Report merely states: "The preemption provisions of title I are not to exempt any person from any State law that regulates insurance . . . ." *Id.*[4]

Moreover, the Conference Committee's changes were not disclosed until the Conference Reports were filed with Congress fewer than ten days before the statute was passed in August 1974. *See* Brummond, *Federal Preemption of State Insurance Regulation Under ERISA*, 62 Iowa L. Rev. 57, 115-16 (1976). Thus, "the present language of section 514 was inserted by the Conference Committee at a very late hour, after no congressional hearings, and with little explanatory comment . . . ." *Id.* at 116.[5]

[4] The legislative history of prior versions of the preemption provision is similarly unenlightening. *See, e.g.*, S. REP. NO. 127, 93d Cong., 1st Sess. 35, 47 (1973), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 4838, 4871, 4883.

[5] In addition, Congress was preoccupied during this period with the issues arising from President Nixon's resignation on August 9, 1974. *See* 120 CONG. REC. 29,933 (1974) (remarks of Sen. Javits). "[I]t would be naive to suppose that during this period any serious attention could have been devoted to such matters as the status of an obscure preemption provision in a 250-page federal statute." Brummond, *Federal Preemption of State Insurance Regulation Under ERISA*, 62 IOWA L. REV. 57, 116 (1976); *see also* Okin, *Preemption of State Insurance Regulation by ERISA*, 13 FORUM 652, 678 (1978); Comment, *ERISA Preemption and Indirect Regulation of Employee Welfare Plans Through State Insurance Laws*, 78 COLUM. L. REV. 1536, 1542 & n. 42 (1978) (hereafter cited as *ERISA Preemption* Comment).

The few substantive comments concerning preemption made during the debate on the Conference Reports focused on the scope of § 1144(a), not on the exceptions to preemption like the insurance savings clause. *See ERISA Preemption* Comment, *supra* note 5, at 1542 & n. 42. And the three veiled references that were made to the savings clause during the debate on the Conference Reports are not helpful in ascertaining the intended reach of that clause. *See* 120 Cong. Rec. 29,942 (1974) (remarks of Sen. Javits) (referring merely to "certain exceptions . . ."); *see also id.* at 29,197 (remarks of Rep. Dent); *id.* at 29,933 (remarks of Sen. Williams). There is no indication in ERISA's legislative history that Congress recognized the tension between the preemption provision itself, which preempted any state law relating to employee benefit plans, and the insurance savings clause, which preserved all state laws regulating insurance. Thus, there is absolutely no indication that Congress intended to preempt state statutes such as this one.

The language and legislative history of the insurance savings clause therefore require a presumption that Congress intended to give the clause its ordinary meaning: the Court "must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Shaw v. Delta Air Lines, Inc.*, 103 S. Ct. at 2900.

Interpreting the insurance savings clause according to its plain meaning indicates clearly that Massachusetts' mandated benefit statute is a law that regulates insurance within the meaning of that clause. Section 47B is contained in the chapter of the state statutes that pertains to insurance. It was proposed by the legislature's Joint Committee on Insurance. It was enacted because the legislature found that "[a] need . . . exists for all people to be safeguarded against the high and sometimes crippling costs of professional mental health care today" and that "in order for the cost to be reasonable, insurance for mental illness must be a mandatory feature on all policies sold in the state." General Court Joint Committee on In-

surance, *Advances in Health Insurance in Massachusetts* 9, 5 (Aug. 1974). And it operates by regulating the contents of insurance policies. Certainly, these factors suggest that Section 47B is a law that regulates insurance.

This conclusion is corroborated by the tradition of state insurance regulations—begun long before ERISA was enacted—that, like Section 47B, govern the contents of insurance policies in an effort to protect the interests of the insured. One commentator has noted that the first mandated benefit legislation was enacted in California in 1949. *See* Peel, *Regulatory Developments in Minimum Standards for Health Insurance Policies*, 13 Forum 680, 682 (1978). Since that time, state legislatures have passed a wide variety of mandated benefit legislation.

In Massachusetts, for example, since at least 1956 all group life insurance policies have been required to guarantee that any insured who leaves the group will remain insured under the policy for a certain period unless he is otherwise entitled to similar benefits. *See* Mass. Ann. Laws ch. 175, § 134(4) (Michie/Law. Co-op. 1977). A similar provision governing group health insurance policies was enacted in 1967. *See id.* § 110D. In 1960, the legislature enacted a statute requiring insurance policies to provide coverage for those hospitalized or receiving treatment in a state soldiers' home. *See id.* § 22. In 1962, the Commonwealth required all health insurance policies that provide for termination of a dependent child's coverage at a specified age to continue coverage if the child is "mentally or physically incapable of earning his own living on the termination date . . . ." *Id.* § 108(2)(a)(3). In 1973, in addition to enacting Seciton 47B, the legislature required all group health insurance policies to provide certain specified benefits for the treatment of alcoholism. *See id.* § 110(H). These are only some of the many provisions in the Massachusetts statutes regulating insurance that have been in existence since ERISA was enacted and that mandate specific insurance benefits.[6]

[6] *See also, e.g.,* MASS. ANN. LAWS ch. 175, § 22 (Michie/Law. Co-op. 1977) (prohibiting certain insurance policy provisions; adopted before 1960); *id.* § 47C (requiring all group health insurance policies to provide coverage for newborn infants and adopted children, including coverage of birth abnormalities; adopted on August 9, 1974); *id.* §§ 113C, 113L (requiring all automobile insurance policies to include certain coverage; adopted in 1968); *id.* § 132(1) (requiring life insurance policies to contain a provision providing that the insured is entitled to a thirty-day grace period within which to pay any premium due after the first year; adopted by 1933); *id.* §§ 132(6), 142 (requiring life insurance policies to include a provision entitling the insured to a loan on the policy at a specified interest rate; adopted by 1943).

Thus, "a myriad of state enactments . . . have provided for years the guidance as to what is and is not permissible in the writing of insurance for employee groups." Manno, *ERISA Preemption and the McCarran-Ferguson Act: The Need for Congressional Action*, 52 Temple L.Q. 51, 56 (1979). *See also* Okin, *supra* note 5, at 656 ("State insurance departments have long exercised jurisdiction over the content of individual and group accident and health policies issued in their state by insurance carriers.").[7]

[7] California, Florida, Michigan, Missouri, and Virginia enacted legislation between 1968 and 1972 that requires insurers to extend major medical coverage to dependents who are disabled when they reach the age where they would otherwise be terminated from coverage under the terms of the policy. *See Wayne Chemical, Inc. v. Columbus Agency Service Corp.*, 426 F. Supp. 316, 324 n. 8 (N.D. Ind. 1977), *modified on other grounds*, 567 F.2d 692 (7th Cir. 1977); VA. CODE § 38.1-348.1 (1981). In 1971, Wisconsin required group health insurance policies to provide coverage for treatment of alcoholism, *see* WIS. STAT. ANN. § 632.89 (West 1980), and Connecticut required such policies to provide mental health benefits, *see* CONN. GEN. STAT. ANN. § 38-174d (West Supp. 1984). Since 1971, California has required that any group hospital, medical, or surgical policy provide coverage for mentally or physically handicapped dependents of the insured after the dependents reach the age of majority. *See* CAL. INS. CODE § 10277 (West 1972). In 1973, the Virginia legislature passed a statute requiring all plans for furnishing prepaid medical services to pay for services rendered by licensed psychologists, podiatrists, chiropractors, and optometrists. *See* VA. CODE § 38.1-824 (1981). Since 1973, Maryland has required all health insurance policies to provide mental health benefits, *see* MD. ANN. CODE art. 48A, § 477E (1979); Minnesota has required that

When ERISA was enacted, therefore, there was already a long tradition of state regulation of the contents of insurance policies. Congress must have been aware of that fact—especially since at that very time insurance companies and state insurance commissioners were developing policies on mandated benefit statutes.[8] And Congress was obviously aware that some pension plans might purchase insurance because ERISA defines "employee welfare benefit plan" as a plan that provides certain benefits "through the purchase of insurance or otherwise . . . ." 29 U.S.C. § 1002(1). If Congress had intended to end the States' longstanding tradition of regulating the contents of insurance policies, it would likely have limited the insurance savings clause in some fashion. *See Insurance Comm'r v. Metropolitan Life Ins. Co.*, 296 Md. 334, 340, 463 A.2d 793, 796 (1983).[9] The fact that it did not suggests that the insurance savings clause was actually intended to mean what it says and thus to preserve state laws like Section 47B.

all health insurance policies provide coverage for treatment of alcoholism and drug dependence, *see* MINN. STAT. ANN. § 62A.149 (West Supp. 1984); and Wisconsin has required that every group health policy offer certain coverage for treatment of tuberculosis, *see* WIS. STAT. ANN. § 632.90 (West 1980).

[8] In fact, state mandated benefit statutes were sufficiently common prior to the enactment of ERISA to attract considerable attention by the insurance industry. In late 1971, the Health Insurance Association of America (HIAA), which filed an *amicus* brief in support of appellants' jurisdictional statements, appointed a Task Force on Minimum Standards for Health Insurance Policies. The National Association of Insurance Commissioners (NAIC) began deliberations on minimum standards legislation in late 1972; in December 1973, the NAIC adopted a model mandated benefit statute. In early 1974, the HIAA Task Force then began to develop its recommendations for a model statute and, in May 1974, submitted a draft to the NAIC. *See* Peel, 13 FORUM at 682-86. The *amicus* brief filed by HIAA in this case indicates that the association has a membership of 327 private insurance companies, including both appellants, and that these companies write more than eighty-five percent of the health insurance policies written by private insurance companies in this country. *See* Brief *Amicus Curiae* of Health Insurance Association of America in Support of Jurisdictional Statements at 1. HIAA's Vice President and General Counsel is Joe W. Peel, the author of the article cited above.

[9] In fact, a bill was introduced in 1979 to amend ERISA to provide that state mandated benefit statutes are not preserved by the insurance savings clause. *See* S. 209, 96th Cong., 1st Sess. § 155, 125 CONG. REC. 933, 937 (1979). The bill was intended to overrule the court's decision in *Wadsworth v. Whaland*, 562 F.2d 70 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978). *See* 125 CONG. REC. 947 (1979) (remarks of Sen. Javits). Although the bill was reported to the Senate, it apparently died without ever being debated. *See* SENATE COMM. ON LABOR AND HUMAN RESOURCES, 96TH CONG., LEGISLATIVE CALENDAR 108, 111 (final ed. Jan. 4, 1981).

Admittedly, Congress' failure to pass this bill does not necessarily demonstrate its intent that the insurance savings clause exempt mandated benefit statutes from preemption under ERISA. But this postenactment history does indicate that Congress was at least aware of the courts' interpretation of the insurance savings clause, and "it lends weight to the argument . . ." that the savings clause was intended to except mandated benefit statutes. *North Haven Board of Education v. Bell*, 456 U.S. 512, 534 (1982). Moreover, "the relatively insubstantial interest given [this portion of S. 209] seems particularly significant since Congress has proceeded to amend . . ." ERISA's preemption provision in another respect proposed by S. 209. *Id. Compare* S. 209, 96th Cong., 1st Sess. § 155, 125 CONG. REC. 937 (1979), *with* 29 U.S.C. § 1144(b)(5)(A).

The overwhelming majority of courts that have considered this issue have concluded that mandated benefit laws are laws that regulate insurance and thus within the scope of the insurance savings clause.[10]

C. The Massachusetts Statute Does Not Fall Within the Scope of the "Deemer Provision."

Although Section 47B must be considered a state law regulating insurance, it is nonetheless preempted by

[10] *See, e.g., American Progressive Life & Health Ins. Co. v. Corcoran*, 715 F.2d 784, 787 (2d Cir. 1983); *Wayne Chemical, Inc. v. Columbus Agency Service Corp.*, 567 F.2d 692, 700 (7th Cir. 1977); *Wadsworth v. Whaland*, 562 F.2d at 77; *St. Paul Elec. Workers Welfare Fund v. Markman*, 490 F. Supp. 931, 933 (D. Minn. 1980); *Insurance Comm'r v. Metropolitan Life Ins. Co.*, 296 Md. 334, 344-45, 463 A.2d 793, 798 (1983); *Metropolitan Life Ins. Co. v. Whaland*, 119 N.H. 894, 901-02, 410 A.2d 635, 640 (1979) (per curiam). *But see Michigan United Food & Commercial Workers Unions v. Baerwaldt*, 572 F. Supp. 943 (E.D. Mich. 1983), *appeal docketed*, No. 83-1570 (6th Cir. Aug. 16, 1983).

ERISA if it falls within the scope of the one exception to the insurance savings clause. That exception, the so-called "deemer provision," provides that an employee benefit plan may not "be deemed to be an insurance company or other insurer, . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies [or] insurance contracts . . . ." 29 U.S.C. § 1144(b)(2)(B).

The plain meaning of that provision indicates that it does not apply to the statute in question here. The deemer provision clearly states only that a State may not deem an employee benefit plan to be an insurance company and thereby attempt to apply its insurance laws to the benefit plan.

No legislative history suggests that the deemer provision was intended to mean anything other than what it says. The Report explaining the Conference Committee's amendments to the preemption provision merely restates the language of the deemer provision without clarifying its meaning. *See* H.R. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 5038, 5162. And there was no mention of the deemer provision either during the debate on the Conference Report or in prior Committee Reports.

Subsequent legislative history does, however, confirm that the deemer provision should be interpreted according to its plain meaning. An activities report issued in 1977 by the Subcommittee on Labor Standards of the House Committee on Education and Labor explains: "the 'deemed' language was utilized to create an irrebuttable presumption that these [employee benefit] plans are not insurance . . . for purposes of state regulation. . . . The irrebuttable presumption would not be overcome even if an employee benefit plan engages in activities which bring it within the insurance . . . activities generally regulated by a state." H.R. Rep. No. 1785, 94th Cong., 2d Sess. 47 (1977). Thus, the Report makes clear that, even though self-insured employee benefit plans may have some of the characteristics of insurance, the deemer provision prohibits a state from applying its insurance regulations to such benefit plans on the ground that they are engaged in the business of insurance.[11] The Report then goes on to point out that an insurance policy sold to an employee benefit plan *is* subject to state regulation:

> "[C]ertain entrepreneurs have undertaken to market insurance products to employers and employees at large, claiming these products to be ERISA covered plans. . . . The entrepreneur will then argue that his enterprise is an ERISA benefit plan which is protected, under ERISA's preemption provision, from state regulation. . . . [T]hese plans are . . . no more ERISA plans *than is any other insurance policy sold to an employee benefit plan.*
>
> "To the extent that such programs fail to meet the definition of an 'employee benefit plan,' *state regulation of them is not preempted by section 514, even though such state action is barred with respect to the plans which purchase these 'products.'*" *Id.* at 48 (emphasis added).

This subsequent history is not conclusive evidence of the deemer provision's meaning, but it does provide evidence of Congress' intent, especially in the absence of contemporaneous legislative history. *See, e.g., North Haven Board of Education v. Bell*, 456 U.S. 512, 535 (1982).

Thus, the courts have interpreted the deemer provision to prohibit States from regulating self-insured employee benefit plans under their insurance laws.[12] But the ma-

[11] *See, e.g.*, Brummond, *supra* note 5, at 77, 90-91; Manno, *ERISA Preemption and the McCarran-Ferguson Act: The Need for Congressional Action*, 52 Temple L.Q. 51, 59 (1979). Because no self-insured benefit plans are involved here, the Court need not rule on the proper application of the ERISA preemption provision in cases involving self-insured plans—for example, whether the deemer provision prohibits a state from applying its insurance regulations to a self-insured benefit plan if additional factors, aside from the mere fact of self-insurance, indicate that the plan is engaged in the business of insurance. Likewise, the Court need not attempt to define precisely what is a self-insured plan.

[12] *See, e.g., Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294, 1300 (N.D. Cal. 1977), *aff'd*, 571 F.2d 502, 504 (9th Cir.) (per

jority of courts have also concluded that the deemer provision does not apply to mandated benefit statutes, like Section 47B, that regulate the contents of insurance policies sold to employee benefit plans.[13]

If the deemer provision is interpreted more broadly to bar state regulation of insurance policies issued to employee benefit plans, it would nullify the insurance savings clause. ERISA preempts all state insurance laws that "relate to" employee benefit plans, unless they are excepted by the savings clause. And the deemer provision prohibits States from directly regulating employee benefit plans. If the deemer provision is also interpreted to preempt all state laws that regulate the contents of insurance policies purchased by benefit plans, no state insurance laws relating to benefit plans would be left for the savings clause to save—rendering the savings clause superfluous, in violation of the well-established principle that legislation should be construed so as to give effect to each part. *See, e.g., McDonald v. Thompson*, 305 U.S. 263, 266 (1938). Thus, the deemer provision cannot be read to preempt Section 47B, and that statute must fall within the scope of the insurance savings clause.

II. THE McCARRAN-FERGUSON ACT WAS INTENDED TO PRESERVE MANDATED BENEFIT STATUTES.

Any doubt about ERISA's effect on mandated benefit statutes is laid to rest by the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, which provides in relevant part:

curiam), *cert. denied*, 439 U.S. 831 (1978); *Russo v. Boland*, 103 Ill. App. 3d 905, 909-10, 431 N.E.2d 1294, 1298 (1982).

[13] *See Wadsworth v. Whaland*, 562 F.2d at 77-78; *McLaughlin v. Connecticut General Life Ins. Co.*, 565 F. Supp. 434, 443-44 (N.D. Cal. 1983); *Eversole v. Metropolitan Life Ins. Co.*, 500 F. Supp. 1162, 1169 (C.D. Cal. 1980); *Cate v. Blue Cross & Blue Shield*, 434 F. Supp. 1187, 1190 & n. 5 (E.D. Tenn. 1977); *Insurance Comm'r v. Metropolitan Life Ins. Co.*, 296 Md. at 344-45, 463 A.2d at 798; *Metropolitan Life Ins. Co. v. Whaland*, 119 N.H. at 902-03, 410 A.2d at 640; *ERISA Preemption* Comment, *supra* note 5, at 1540-41. *But see, e.g., General Split Corp. v. Mitchell*, 523 F. Supp. 427, 430 (E.D. Wis. 1981).

"The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." *Id.* § 1012(a).

The first paragraph of the Act declares the congressional policy that "the continued regulation and taxation by the States of the business of insurance is in the public interest." *Id.* § 1011. Thus, the Act represents Congress' judgment that, as a matter of *federal* policy, the regulation of insurance should be performed by the States.[14] Congress recognized that the States had traditionally exercised this power [15] and wanted to ensure the preservation of such authority in the States,[16] which, in Congress' view, were best able to undertake such regulation.[17] As this Court noted in *SEC v. Variable Annuity Life Ins. Co. of America*, 359 U.S. 65, 68 (1959), "[w]hen the States speak in the field of 'insurance,' they speak with the authority of a long tradition."

The McCarran-Ferguson Act is helpful in determining the reach of ERISA's preemption provision for two additional, independent reasons. First, the meaning of the McCarran-Ferguson Act's reference to state "laws . . . which relate to the regulation . . . of [the] business [of insurance]," 15 U.S.C. § 1012(a), aids in defining the meaning of the similar phrase, state "law which regu-

[14] *See, e.g.*, H.R. REP. No. 143, 79th Cong., 1st Sess. 3, *reprinted in* 1945 U.S. CODE CONG. & AD. NEWS 670, 672; S. REP. No. 1112, 78th Cong., 2d Sess. 3, 7 (1944); 90 CONG. REC. 6525 (1944) (remarks of Rep. Walter); *SEC v. National Securities, Inc.*, 393 U.S. 453, 458 (1969).

[15] *See, e.g.*, H.R. REP. No. 143, 79th Cong., 1st Sess. 2, *reprinted in* 1945 U.S. CODE CONG. & AD. NEWS 670, 670-71; S. REP. No. 1112, 78th Cong., 2d Sess. 2 (1944) (noting that the States "have regulated insurance for over 90 years . . .").

[16] *See, e.g.*, H.R. REP. No. 873, 78th Cong., 1st Sess. 6 (1943); 89 CONG. REC. 10,659 (1943) (remarks of Rep. Miller).

[17] *See, e.g.*, S. REP. No. 1112, 78th Cong., 2d Sess. 5, 7 (1944); 90 CONG. REC. 6524 (1944) (remarks of Rep. Walter).

lates insurance," found in the insurance savings clause.[18] Second, the final paragraph of ERISA's preemption provision indicates that Congress expressly intended that ERISA not alter or impair any federal statute, including the McCarran-Ferguson Act. *See* 29 U.S.C. § 1144(d).

A. The Relevant Caselaw Compels the Conclusion that Section 47B Is a Statute that Regulates the Business of Insurance.

This Court's decisions interpreting the McCarran-Ferguson Act have identified three criteria relevant in determining whether a particular practice falls within the Act's reference to the "business of insurance": "*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry." *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982) (emphasis in original). Mandated benefit statutes like Section 47B satisfy all three criteria.

The first criterion was set forth in detail in *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 212, 211 (1979), where the Court noted that one "indispensable characteristic of insurance" is "the spreading and underwriting of a policyholder's risk." Section 47B unquestionably relates to the spreading and underwriting of risk. The statute reflects a legislative judgment that the costs of mental health care should be underwritten by health insurance policies and that the risk of costly mental health care should be shared. *See* General Court Joint Committee on Insurance, *Advances in Health Insurance in Massachusetts* 5 (Aug. 1974); Superior Court Findings & Conclusions, *reprinted in* App. to Juris. Stmts. at 36a, 50a-51a. It therefore requires that insurance policies insure against "the risk that policyholders will be unable

[18] *See, e.g., Marks v. United States*, 161 U.S. 297, 302 (1896); *McLaughlin v. Connecticut General Life Ins. Co.*, 565 F. Supp. 434, 443 (N.D. Cal. 1983); *Metropolitan Life Ins. Co. v. Whaland*, 119 N.H. 894, 901, 410 A.2d 635, 639 (1979) (per curiam).

to pay for [the cost of mental health care] during the period of coverage." *Royal Drug*, 440 U.S. at 213. By requiring certain coverage in all insurance policies, Section 47B "defines the scope of risk assumed by the insurer from the insured" and has a direct impact on "the measure of the risk" that is transferred to the insurer. *Pireno*, 458 U.S. at 131, 130.

The second criterion was set forth in detail in *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969), where the Court noted that the McCarran-Ferguson Act "was concerned with the type of state regulation that centers around the contract of insurance . . . . The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.'" Congress' "focus," the Court continued, "was on the relationship between the insurance company and the policyholder. Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the 'business of insurance.'" *Id.*

Section 47B clearly falls within the scope of this criterion. The statute "centers around the contract of insurance" by prescribing terms that must be included within that contract, and it determines "the type of policy which [can] be issued." And Section 47B is an attempt by the legislature to "secure the interests of those purchasing insurance policies," *id.*, by requiring that the insurer provide certain safeguards to all policyholders. Unlike *Pireno*, therefore, this case involves a statute that is "an integral part of the policy relationship between the insurer and insured." 458 U.S. at 131.

The third criterion is likewise present in this case. Mandated benefit statutes impose requirements solely on insurers, and their purpose is to affect only the relationship between insurers and their policyholders; they do not "inevitably involve[] third parties wholly outside the insurance industry . . . ." *Id.* at 132.[19]

[19] *See also, e.g., Feinstein v. Nettleship Co.*, 714 F.2d 928, 932 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2346 (1984) (noting that

Thus, this Court's prior decisions interpreting the scope of the McCarran-Ferguson Act indicate clearly that Section 47B is a law that regulates the business of insurance and is not to be superseded by any federal statute. This conclusion has likewise been reached by the vast majority of courts which have considered the question whether the type of benefits offered by an insurance policy fall within the scope of the McCarran-Ferguson Act. In *Grant v. Erie Ins. Exchange*, 542 F. Supp. 457 (M.D. Pa. 1982), *aff'd mem.*, 716 F.2d 890 (3d Cir.), *cert. denied,* 104 S. Ct. 349 (1983), for example, the plaintiffs challenged the defendant insurance companies' refusal to provide insurance coverage for work loss benefits to persons who died in automobile accidents. Noting that "'[m]atters of . . . extent of coverage . . . go to the very heart of the relationship between the insurance company and the policyholder . . . ,'" the court held that the McCarran-Ferguson Act was applicable in that case. *Id.* at 462 (quoting *McIlhenny v. American Title Ins. Co.,* 418 F. Supp. 364, 369 (E.D. Pa. 1976)).[20]

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the term "entities within the insurance company" includes insurers and insureds).

[20] Likewise, in *Anglin v. Blue Shield,* 693 F.2d 315 (4th Cir. 1982), the plaintiff challenged Blue Shield's refusal to offer him a policy protecting himself and his minor child; Blue Shield would offer such a policy only if it also covered the plaintiff's wife. The court concluded that the McCarran-Ferguson Act was applicable because "[t]he allegations in the plaintiff's complaint are the very essence of the relationship between insurer and policyholder. He has alleged that Blue Cross/Blue Shield has refused to offer the exact coverage that he prefers." *Id.* at 320.

See also, e.g., Perry v. Fidelity Union Life Ins. Co., 606 F.2d 468, 476 (5th Cir. 1979), *cert. denied,* 446 U.S. 987 (1980); *Lowe v. Aarco-American, Inc.*, 536 F.2d 1160, 1162 (7th Cir. 1976); *Addrisi v. Equitable Life Assurance Soc'y of United States,* 503 F.2d 725 (9th Cir. 1974), *cert. denied,* 420 U.S. 929 (1975); *Dawson v. Whaland,* 529 F. Supp. 626, 632 (D.N.H. 1982); *Pierucci v. Continental Casualty Co.,* 418 F. Supp. 704 (W.D. Pa. 1976); *New Hampshire-Vermont Health Service v. Whaland,* 119 N.H. 886, 893, 410 A.2d 642, 647 (1979) (per curiam); P. AREEDA, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 43 (1982 Supp.); Brummond, *supra* note 5, at 104; Manno, *supra* note 11, at 53.

B. The Legislative History Compels the Conclusion that Section 47B Is a Statute that Regulates the Business of Insurance.

The legislative history of the McCarran-Ferguson Act provides further confirmation that Congress intended that federal laws like ERISA should not interfere with state statutes like Section 47B. Although the phrase "laws . . . which relate to the regulation . . . of [the] business [of insurance]" is not defined in the legislative history of the McCarran-Ferguson Act, that history indicates that Congress clearly understood that the Act would protect state laws regulating the terms and contents of insurance policies and the types of coverage and benefits offered. For example, Sen. Ferguson, one of the sponsors of the Act, observed that "a state law relating to . . . the fixing of the terms of a contract of insurance . . . would be permitted . . . ." 91 Cong. Rec. 480 (1945).[21] As this Court noted in *Prudential Ins. Co. v. Benjamin,* 328 U.S. 408, 430 (1946), "Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation . . ." when it enacted the McCarran-Ferguson Act.

Moreover, that Act was intended to give the States very broad power to regulate the business of insurance. "The unequivocal language of the Act suggests *no* exceptions." *Western & Southern Life Ins. Co. v. State Board of Equalization,* 451 U.S. 648, 653 (1981) (emphasis added). Thus, Sen. Ferguson noted that the Act gave the States "full power to act by legislation . . . ." 91

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[21] *See also, e.g.,* 90 CONG. REC. 6561 (1944) (remarks of Rep. Anderson) ("the States [do] have a right to control risks . . . and all the other things which the average insurance men recognize come under State regulations"); *id.* at 6528 (remarks of Rep. Miller); *id.* at 6536 (remarks of Rep. Howell); *id.* at 6538 (remarks of Rep. Springer); *id.* at 6546 (remarks of Rep. Voorhis); *id.* at 6556 (remarks of Rep. Graham).

Cong. Rec. 1481 (1945).[22] And throughout the legislative history, the observation was frequently made that the Act was meant to give the States broad discretion "to regulate insurance as they each see fit." S. Rep. No. 1112, 78th Cong., 2d Sess. 5 (1944).[23]

Moreover, the latitude given the States to regulate the business of insurance was not meant to apply only to the precise forms of state regulation in existence in 1945 when the McCarran-Ferguson Act was passed. Rather, the Act was intended to permit the States to take steps to resolve any unforeseeable problems that might face the insurance industry in the future. *See* 91 Cong. Rec. 483 (1945) (remarks of Sen. Radcliffe). Congress therefore recognized that the States would continue to make use of "experimentation" in regulating insurance, S. Rep. No. 1112, 78th Cong., 2d Sess. 6 (1944), to ensure "[p]rogress in insurance," which "can be made only by constantly liberalizing coverage and constantly reducing costs." 90 Cong. Rec. 6550 (1944) (remarks of Rep. Ploeser). Thus, "enactment of the McCarran-Ferguson Act 'put the full weight of [Congress'] power behind existing *and future* state legislation . . . .'" *Western & Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. at 654 (quoting *Prudential Ins. Co. v. Benjamin*, 328 U.S. at 431) (emphasis added).

The McCarran-Ferguson Act was also meant to protect state insurance laws from preemption by federal statutes that might later be enacted. Thus, Sen. Ferguson explained, "if Congress should tomorrow pass a law relating to interstate commerce, and should not specifically apply the law to the business of insurance, it would not be an implied repeal of this bill, and this bill would not be affected . . . ." 91 Cong. Rec. 481 (1945).[24] The McCarran-Ferguson Act therefore "remov[ed] obstructions [to state regulation of insurance] which might be thought to flow from [Congress'] power, whether dormant or exercised, except as otherwise expressly provided in the Act itself *or in future legislation.*" *Prudential Ins. Co. v. Benjamin*, 328 U.S. at 429-30 (emphasis added).[25]

[22] *See also, e.g.*, 91 CONG. REC. 483 (1945) (remarks of Sen. Radcliffe); 90 CONG. REC. 6559 (1944) (remarks of Rep. Sumners); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 551 (1978) (referring to "the overall framework of plenary state regulation . . .").

[23] *See also* 91 CONG. REC. 1481 (1945) (remarks of Sen. Ferguson); 90 CONG. REC. 6418 (1944) (remarks of Rep. Allen).

[24] Although the McCarran-Ferguson Act provides that a federal law that "*specifically relates* to the business of insurance" may be construed to preempt state insurance regulations, 15 U.S.C. § 1012(b) (emphasis added), that provision is not applicable in this case. ERISA is not a law that specifically relates to the business of insurance. Rather, ERISA specifically relates to employee benefit plans. Moreover, it is difficult to understand how ERISA can be viewed as a statute explicitly designed to repeal the McCarran-Ferguson Act and to preempt state insurance regulations when ERISA expressly indicates *no* intent to displace state insurance laws and *no* intent to supersede the McCarran-Ferguson Act. *See Cochran v. Paco, Inc.*, 606 F.2d 460, 464 (5th Cir. 1979); *Wadsworth v. Whaland*, 562 F.2d 70, 78 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978).

Two courts have found that some portions of ERISA do specifically relate to the business of insurance within the meaning of the McCarran-Ferguson Act. *See Hewlett-Packard Co. v. Barnes*, 571 F.2d 502, 505 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 831 (1978); *Wayne Chemical, Inc. v. Columbus Agency Service Corp.*, 426 F. Supp. 316, 320 n. 1 (N.D. Ind. 1977), *modified on other grounds*, 567 F.2d 692 (7th Cir. 1977). But neither court articulated a persuasive rationale for its conclusion.

[25] The portion of the McCarran-Ferguson Act providing that the Act does not "affect in any manner the application to the business of insurance . . ." of the NLRA is not relevant to this case—even though some of the employee benefit plans that purchase insurance policies from appellants are the result of collective bargaining. 15 U.S.C. § 1014. That provision was meant to codify this Court's decision in *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643 (1944), which held that the labor relations of insurance companies are subject to the NLRA. *See, e.g.*, 91 CONG. REC. 1090 (1945) (remarks of Rep. Gwynne); 90 CONG. REC. 6419 (1944) (remarks of Rep. Allen); Weller, *The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy*, 1978 DUKE L.J. 587, 594. Thus, that section provides only that the McCarran-Ferguson Act does not "jeopardize the rights of insurance workers . . ." under the NLRA; it therefore has no application

Thus, the McCarran-Ferguson Act was drafted to protect the long tradition of state regulation of the business of insurance. Because mandated benefit statutes like Section 47B regulate the business of insurance within the meaning of the McCarran-Ferguson Act, that statute requires, as a matter of federal policy, that such state statutes be preserved. Thus, this case involves more than a conflict between a state law—Section 47B—and a federal law—ERISA. Rather, it involves a conflict between two federal laws—ERISA and the McCarran-Ferguson Act. Resolution of such a conflict might be difficult if Congress had not indicated on two separate occasions in ERISA that the important policies underlying the McCarran-Ferguson Act should prevail. Given the two express exceptions to the reach of ERISA's preemption provision—the insurance savings clause and the provision indicating that ERISA is not intended to impair any federal law—any conflict between ERISA and the McCarran-Ferguson Act must be resolved in favor of the latter, and therefore in favor of mandated benefit statutes like Section 47B.

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to this case. 90 CONG. REC. 6526 (remarks of Rep. Brehm). *See also, e.g., Women in City Gov't United v. City of New York*, 515 F. Supp. 295, 304 (S.D.N.Y. 1981); *John Hancock Mutual Life Ins. Co. v. Commissioner of Ins.*, 349 Mass. 390, 397-98, 208 N.E.2d 516, 522 (1965).

Likewise, the NLRA does not itself preempt Section 47B. *See Malone v. White Motor Corp.*, 435 U.S. 497, 504-05 (1978) (noting that "nothing in the NLRA . . . expressly forecloses all state regulatory power with respect to those issues, such as pension plans, that may be the subject of collective bargaining," and that in another statute, the predecessor to ERISA, Congress had "recognized and preserved state authority to regulate pension plans . . ." without distinguishing those established by collective bargaining); *see also Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 526 n. 23 (1981) (noting that where Congress preserves the States' role, the NLRA does not preempt state regulation).

III. APPELLANTS' NARROW READING OF THE INSURANCE SAVINGS CLAUSE IS UNSUPPORTABLE.

Appellants propose that ERISA's insurance savings clause be construed to preserve only "the traditional areas of state insurance regulation . . ."—for example, "licensing and examination of insurers, . . . minimum capital and surplus requirements, . . . [and] general oversight of insurance companies." Brief for Appellant Metropolitan Life Insurance Co. at 34-35. There is absolutely no support for this exceedingly narrow reading of the savings clause.

A. The Statutory Language, Legislative History, and Judicial Construction of the Relevant Statutes Do Not Support Appellants' Reading of the Insurance Savings Clause.

Appellants' proposed construction of the savings clause distorts the plain meaning of that clause, which broadly preserves "any law of any State which regulates insurance . . . ." It cannot be read to preserve only those insurance laws that are to appellants' liking.

Moreover, appellants' interpretation of the insurance savings clause renders it completely superfluous. ERISA's preemption provision supersedes only those state laws that "relate to" employee benefit plans. But the types of insurance regulations appellants consider "traditional" are in no way related to employee benefit plans. Rather, they relate solely to insurance companies. If the insurance savings clause is interpreted to preserve only those types of insurance regulations, it has no meaning whatsoever because such regulations are not even arguably preempted by ERISA.

In addition, there is no support for appellants' limited definition of traditional areas of state insurance regulation. In fact, there is a very long tradition of state statutes, like Section 47B, that prescribe the contents of insurance policies and that mandate that certain benefits be included in those policies. *See SEC v. Variable Annuity Life Ins. Co. of America*, 359 U.S. 65, 79 (1959)

(acknowledging "[t]he traditional state insurance department regulation of contract terms . . ."). That tradition was solidly established when ERISA was enacted in 1974—and even when the McCarran-Ferguson Act was enacted in 1945. If Congress had meant to exclude such traditional forms of state insurance regulation from the savings clause, it certainly would have so stated and would not have applied that clause to "any law of any State which regulates insurance . . . ." [26]

B. The Relevant Policy Considerations Do Not Support Appellants' Reading of the Insurance Savings Clause.

Because appellants' construction of the insurance savings clause is not supported by the relevant statutory language, legislative history, or caselaw, they perforce rely on policy considerations supposedly favoring their reading of that clause. But "[t]hese policy considerations were for Congress to weigh, and [this Court is] not free to ignore the language and history of [ERISA and the McCarran-Ferguson Act] even were [the Court] to disagree with the legislative choice." *North Haven Board of Education v. Bell*, 456 U.S. 512, 536 n. 26 (1982). Moreover, "[r]eferral to the legislators is particularly appropriate in this case, as the policy aspects may not be as one-sided as those painted by [appellants]." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 256 n. 26 (1979) (Brennan, J., dissenting).

[26] In a case similar to this one, this Court rejected the Federal Government's narrow reading of the term "health insurance" as it appeared in another federal statute. The Court relied on the absence of a definition of the term in the statute or legislative history, and on the lack of support for the limited definition in the statutory language or legislative history. Accordingly, the Court concluded that the Federal Government had "offer[ed] no persuasive reasons why the term 'health insurance' in [26 U.S.C.] § 22(b)(5) should be limited to the particular forms of insurance conventionally made available by commercial companies." *Haynes v. United States*, 353 U.S. 81, 84 (1975). Similar reasoning requires rejection of appellants' narrow definition of the term "insurance" in the insurance savings clause.

Leaving the task of balancing the relevant policies to Congress is additionally appropriate in this case because it involves a conflict between two federal statutes and because Congress has already rejected attempts to amend ERISA so as to preempt state mandated benefit laws. *See* note 9, *supra*. Because *amici* believe that this Court should not involve itself in weighing the conflicting policy considerations at issue in this case, we discuss them only briefly and limit the discussion to points not addressed in the *amicus* brief of the Committee for Comprehensive Insurance Coverage.

Appellants' construction of the insurance savings clause would create an immense regulatory vacuum in the field of insurance. It would result in the preemption of all state statutes prescribing the contents of insurance policies—at least insofar as those statutes applied to policies sold to employee benefit plans governed by ERISA. For example, the statutes cited at pages 8-10 above would all be subject to preemption.[27] There is no federal system for the regulation of insurance to replace this comprehensive and traditional scheme of state regulation. And ERISA does not attempt to control the substance of health and welfare benefits. In fact, the bulk of ERISA is directed at pension plans, not at welfare plans like those at issue in this case.[28] Ceasing all governmental regulation of welfare benefit plans, other than ERISA's disclosure and

[27] Appellants' attempt to dismantle the traditional state regulation of the contents of insurance policies, leaving no federal regulation in its place, is the latest in a long line of attempts by the insurance companies to avoid regulation. *See, e.g., Polish Nat'l Alliance v. NLRB*, 322 U.S. 643, 648-49 (1944); 90 Cong. Rec. 6537-38 (1944) (remarks of Rep. Celler); Weller, *supra* note 25, at 590, 592, 614.

[28] The statute's title suggests that Congress was primarily concerned with pension benefit plans. Moreover, the scarcity of regulatory provisions applicable to welfare benefit plans and the congressional hearings indicate that reform of private pension plans was Congress' main objective. *See* Brummond, *supra* note 5, at 61-63, 114, 115; *ERISA Preemption* Comment, *supra* note 5, at 1536 n. 4, 1546 n. 70.

fiduciary requirements, is completely inconsistent with the legislative history of the McCarran-Ferguson Act, which indicates that Congress wished to avoid "the grave danger, unless something is done at once, that the insurance companies will be absolutely unregulated." 90 Cong. Rec. 6548 (1944) (remarks of Rep. Hobbs). It is likewise inconsistent with the legislative history of ERISA, which indicates that Congress wished to preserve the existing scheme of state insurance regulation, and that Congress was concerned with the inadequacy of governmental regulation of employee benefit plans, *see, e.g.*, 29 U.S.C. § 1001.[29]

Appellants' proposal would be exceedingly difficult to administer. In defining "the traditional areas of state insurance regulation," they suggest a distinction between "the wide range of state laws designed to protect the insurance purchaser from improper or imprudent conduct by the insurance company" and "state laws whose purpose and effect is to control plan content or the relationship between the plan itself and the plan's beneficiaries." Brief for Appellant Metropolitan Life Insurance Co. at 34. Not only is state control over the content of insurance policies a traditional area of state insurance regulation, but the very purpose of such control is to protect the purchaser of insurance. Accordingly, appellants' attempted distinction has no meaning. Even appellants concede that their construction of the insurance savings clause may lead to "difficult line-drawing problems." *Id.* at 35.

In addition to ignoring the substantial policies disserved by their reading of the insurance savings clause, appellants exaggerate the importance of the policies allegedly supporting their proposal. Appellants argue, for example, that mandated benefit statutes make it more difficult for interstate employers to provide uniform benefits

[29] *See also Insurance Comm'r v. Metropolitan Life Ins. Co.*, 296 Md. 334, 343-44, 463 A.2d 793, 798 (1983); *Metropolitan Life Ins. Co. v. Whaland*, 119 N.H. 894, 903, 410 A.2d 635, 640 (1979) (per curiam).

and therefore create increased administrative costs for such employers. Although Congress may have wished to minimize the need for interstate employers to administer their plans differently in different states, it was also willing to sacrifice that interest to accommodate the States' interests. For example, ERISA permits continued enforcement of state laws relating to workmen's compensation, unemployment compensation, and disability insurance, although they vary substantially from state to state. *See* 29 U.S.C. § 1003(b)(3). Moreover, the insurance savings clause permits the States to enforce at least some insurance laws relating to employee benefit plans, even though those laws likewise differ among the States. Thus, "[m]ere incantation of the congressional goal of uniformity in regulation cannot resolve this question of statutory construction." *Standard Oil Co. v. Agsalud*, 442 F. Supp. 695, 706 (N.D. Cal. 1977), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd mem.*, 454 U.S. 801 (1981).

Moreover, because state laws have traditionally prescribed the contents of insurance policies, diversity in this area has long been the norm for interstate employee benefit plans. And it was precisely such diversity that the McCarran-Ferguson Act was intended to preserve.[30] There is no evidence in ERISA's legislative history that Congress intended to sacrifice this diversity; in fact, Congress' concern for uniformity appears to have been limited to regulation of benefit plans, and not to regulation of insurance companies selling policies to those plans. *See, e.g.*, 120 Cong. Rec. 29,933 (1974) (remarks of Sen. Williams).

[30] *See, e.g., Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 431 (1946) ("Congress intended to declare, and in effect declared, that uniformity of regulation, and of state taxation, are not required in reference to the business of insurance by the national public interest, except in the specific respects otherwise expressly provided for"); 90 Cong. Rec. 6418-19 (1944) (remarks of Rep. Allen); *id.* at 6550 (remarks of Rep. Robsion); *id* at 6551 (remarks of Rep. Ploeser).

Appellants also argue that mandated benefit statutes encourage employee benefit plans to become self-insured. However, there is no evidence in ERISA's language or legislative history that self-insurance is contrary to Congress' intent. In fact, Congress clearly recognized that some employee welfare benefit plans would not purchase insurance policies. *See* 29 U.S.C. § 1002(1). Moreover, the States have every incentive to discourage self-insurance to maximize the impact of mandated benefit statutes and other state insurance regulations, as well as to prevent "a loss of revenue from the traditional state source of insurance company taxation, the premium tax . . . ." Okin, *supra* note 5, at 671.

Thus, although judicial balancing of the countervailing policy considerations is especially inappropriate in this case and should instead be left for Congress, the relevant policies support the decision below.

CONCLUSION

Amici urge this Court to affirm the decision below.

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APPELLEE'S

BRIEF

CORRECTED COPY

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No. 84-325, 84-356.

In the
Supreme Court of the United States.

OCTOBER TERM, 1984.

METROPOLITAN LIFE INSURANCE COMPANY,
APPELLANT,
v.
COMMONWEALTH OF MASSACHUSETTS,
APPELLEE.

THE TRAVELERS INSURANCE COMPANY,
APPELLANT,
v.
COMMONWEALTH OF MASSACHUSETTS,
APPELLEE.

ON APPEALS FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

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Questions Presented.

I. Whether a Massachusetts statute requiring that all health insurance policies issued in the state include minimum mental health benefits is protected from preemption by the Employee Retirement Income Security Act of 1974 (ERISA), because of an express ERISA exemption for state insurance laws (29 U.S.C. § 1144 (b)(2)(A)).

II. Whether a Massachusetts statute requiring that all health insurance policies issued in the state include minimum mental health coverage is preempted by the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 *et seq*.

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No. 84-325, 84-356.

In the Supreme Court of the United States.

October Term, 1984.

METROPOLITAN LIFE INSURANCE COMPANY,
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THE TRAVELERS INSURANCE COMPANY,
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COMMONWEALTH OF MASSACHUSETTS,
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ON APPEALS FROM THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS.

Brief for the Appellee.

Statement of the Case.

The Commonwealth is "dissatisfied", within the meaning of Supreme Court Rule 34.2, with the appellants' Statements of the Case[1] because the appellants continue to press factual and policy arguments which are inconsistent with the findings of the Massachusetts legislature and the trial court. Accordingly, the Commonwealth submits the following to supplement the appellants' statements.

1. This case involves preemption-based challenges to a Massachusetts insurance law that prescribes certain terms to be contained in insurance policies issued in the Commonwealth which provide coverage for hospital and surgical expenses. The statute under attack is codified at Mass. G. L. c. 175, § 47B (West Supp. 1984-1985) (hereinafter, § 47B).[2]

There can be no question that the Massachusetts state legislature adopted § 47B to address the problem of treating mental illness in the Commonwealth and not to avoid the strictures of ERISA. (General Court Joint Committee on Insurance, "Advances in Health Insurance in Massachusetts," 1974, A. 426-458).[3]

In passing the measure in December, 1973, the legislature felt compelled to act because federal policy in the area at that time did not adequately address Massachusetts' or other states'

[1] Brief of Appellant Metropolitan Life Ins. Co. (Metropolitan) at 3-9; Brief of Appellant Travelers Ins. Co. (Travelers) at 2-9.

[2] Section 47B is set forth in its entirety at J.S. App. 87a-89a. J.S. App. refers to the separately bound appendix to the Jurisdictional Statements filed by appellants.

[3] "A." refers to the separately bound Joint Appendix filed by the parties pursuant to Rule 30.

problems (A. 427). Specifically, the legislature perceived that mental health treatment in Massachusetts was inadequate in two basic respects: (1) the large majority of persons who evidenced a need for mental health treatment, namely members of the poor and working segments of society, were not receiving it because they could not afford it, and (2) those persons within the groups who were receiving treatment were generally institutionalized in state-run facilities and were not receiving treatment from community mental health centers, where, it was generally thought, persons could be treated on an out-patient basis and could continue to function within the mainstream of society (A. 430-432).[4]

The legislature recognized that both these treatment inadequacies were at least partially the result of the state of the market for mental health insurance. Because they could not afford it, persons who needed help were unable to obtain mental health insurance which would help pay for their treatment. That payment would in turn support payment of expenses at community-based mental health centers, which would encourage their proliferation across the state and diminish the need for and utilization of state institutions (A. 432-433).

The legislature's recognition that the problems with the treatment of mental illness in Massachusetts stemmed from problems associated with selling mental health insurance in the Commonwealth is precisely on point. Testimony presented by the Commonwealth at trial (A. 219-233), which the trial court

[4] The legislature also understood (and testimony was presented which indicated) that because mental illness was not being treated, or was being treated on an institutionalized basis, Massachusetts was also suffering indirect costs to its economy. Indirect costs include the losses of income and the decreased productivity of workers which result from disability or death due to mental illness and include the incorrect over-utilization of non-psychiatric medical care for mental problems (J.S. App. 51a; A. 209-212, 218-219).

adopted as part of its findings, (J.S. App. 50a), indicated that the market for mental health insurance had become retracted. This retraction of the market was found to be the result of the phenomenon of adverse selection; insurance companies found they could not compete by offering an adequate package of mental health insurance coverage (A. 223-225).

The principle of adverse selection deserves full explanation. It simply means that in a voluntary market poor insurance risks choose to buy mental health insurance. "Good risks" for mental health insurance, *i.e.*, people who do not anticipate using the mental health benefit, do not buy the insurance because premiums are established based on an average price for both good and bad risks, and are therefore too expensive to attract good risks (A. 222). "Bad risks", *i.e.*, people who predict that they will utilize the benefit, buy the insurance, because for them, the average price is attractively low (A. 222). Thus, in a *voluntary* market, insurance companies which sell mental health benefits draw an "*adverse selection*" of the population, *i.e.*, a group dominated by bad risks who will utilize the benefit (A. 223-224).

Ironically, if an insurer reacts to the adverse selection phenomenon by raising premiums, the insurers actually attract a worse collection of bad risks (A. 224). This is so because the good risks who buy the benefit at the "average price," refuse to buy the benefit at the "adverse selection" price. In addition, competition among insurance companies for "good risks" exacerbates the effects of adverse selection; companies which reduce the extent of coverage offered and therefore are able to lower their premiums cause good risks to abandon the insurer with the "adverse selection" of risks. Thus, a competitive and voluntary market creates continual retraction of the mental health insurance market. This cycle destroys the marketability of mental health benefits (A. 224-225).

Massachusetts' solution to the mental health treatment problem was to enact a statute, § 47B, which regulates the types of insurance policies sold in the Commonwealth. All policies

providing coverage for hospital and surgical expense are now required to provide minimum benefits for inpatient and outpatient mental health treatment.[5]

Mandating of minimum levels of mental health insurance as prescribed by § 47B in a market controlled by adverse selection served to correct the retracted state of the insurance market (A. 225-227). Because minimum coverage levels were required, companies did not have to engage in the "ruinous competition for the good risks, leaving the bad risks with their competitors." (A. 225.) Under a mandated benefits policy, "[t]he government mandate can mimic the result of a market if it were able to work correctly by setting prices appropriate for individuals." (A. 226.) The good risks and the bad risks are spread around so that the insurance companies can survive while continuing to provide the benefits (A. 225-226). Mental health insurance is available for everyone to purchase at a price which they can afford (A. 225-226).[6]

This discussion of the purpose of § 47B is not a *post hoc* rationalization offered by the state's attorney. Instead these arguments emerge from an unusal legislative report detailing a number of the public policy goals of the statute. These include (1) the need to provide the public with affordable comprehensive inpatient and outpatient mental health care, (2) the foster-

[5] Section 47B also requires employee benefit plans to provide the same minimum health benefits. With the enactment of ERISA in 1974, however, the Attorney General acknowledged that application of its terms to such plans was preempted. Therefore, the Commonwealth has not sought to enforce § 47B directly against uninsured employee benefit plans. *See* discussion of the pre-ERISA state regulation of employee benefit plans at 27-29, *infra*.

[6] It is important to note that the 1973 statute contained parallel provisions providing for the inclusion of protection against mental illness costs, not just in health insurance policies and employee health and welfare plans, but also in hospital and medical services contracts. Mass. St. c. 1174, §§ 3-6, codified at Mass. G. L. c. 176A, § 8A (West Supp. 1984-1985) and c. 176B, § 4a (West Supp. 1984-1985). Three years later, when health maintenance organizations had emerged as significant providers of medical services, the requirements of § 47B were made applicable to them. Mass. G. L. c. 176G, § 4 (West Supp. 1984-1985).

ing of community-based mental health care as an alternative to state-subsidized institutionalization, (3) the reduction of medical care expenditures for mentally-related illness and (4) the provision of relief to the Commonwealth from some of the financial burden of resolving mental health problems (J.S. App. 52a-53a).

2. The statutes said to preempt § 47B are ERISA and the NLRA (J.S. App. 85a-87a, 89a-91a). ERISA contains a series of express preemption clauses: § 514(a), 29 U.S.C. § 1144(a) generally preempts state laws which relate to employee benefit plans; § 514(b), 29 U.S.C. § 1144(b) saves from preemption state laws which regulate insurance. The NLRA contains no express preemption scheme; therefore, the question of state law preemption by the NLRA turns on the implied intent of Congress.

3. This case originated on June 1, 1979, when the Attorney General filed a civil complaint in the Superior Court of Massachusetts (A. 6-49). In that complaint, the Attorney General requested both a declaration that, the provisions of ERISA and the NLRA notwithstanding, the Metropolitan and Travelers insurance companies were required to issue policies containing the benefits required by § 47B, and injunctive relief effectuating the declaration (A. 11-12). The defendant insurance companies had not themselves challenged the statute, and no ERISA plan was a party to the suit (A. 6-12). A preliminary injunction issued on August 28, 1979 (A. 57-59). The case was heard on its merits between September 22 and 29, 1980. The Findings and Conclusions of the trial court are set forth at J.S. App. 36a-62a.

Throughout this litigation, the Commonwealth has asserted that § 47B is exempt from preemption because ERISA's plain language saves "any law . . . of any state which regulates insurance. . . " 29 U.S.C. § 1144(b)(2)(A) and because Congress did not intend for statutes regulating the types of insurance policies which may be issued in Massachusetts to be preempted by the NLRA (J.S. App. 86a, 89a-91a). The courts of the Commonwealth have consistently reached the same conclusion regarding ERISA, albeit by a somewhat narrower reading of the insurance savings clause than that proposed here. As to both the NLRA and ERISA, the courts also based their decisions on an examination of the practical interplay of § 47B with ERISA and the NLRA (J.S. App. 4a-7a, 17a-34a, 36a-62a).

The trial court rejected the insurers' arguments that § 47B conflicted and interfered with the purposes of ERISA (J.S. App. 51a-56a). The insurers argued that variations from state to state in insurance laws such as § 47B would effect a lack of uniformity in multistate employee benefit plans and also argued that § 47B imposes cost burdens and encourages bankruptcy or promotes self-insurance of employee benefit plans. In rejecting these arguments, which the insurers continue to stress even now, the trial court found as a matter of fact that

> (1) the administrative burden imposed by mandated benefit laws, including diverse eligibility requirements for each state, is no more complex or burdensome to interstate commerce than various other multistate regulatory schemes such as workmen's compensation laws;
>
> (2) the insurers presented no credible evidence that even assuming every state had enacted mandated benefit laws with varied eligibility requirements, such diversity and nonuniformity would be any more complex or burdensome to interstate commerce than other diverse multistate regulatory schemes, such as workmen's compensation laws;
>
> (3) the insurers introduced no credible evidence establishing that the trend toward self-insurance is more pronounced in Massachusetts by virtue of the enactment of § 47B;
>
> (4) the insurers presented no credible evidence of the actual cost insurers would incur if they complied with § 47B;
>
> (5) the insurance companies produced no credible evidence that they could not absorb the cost of compliance

with § 47B; or that any ERISA plan in the United States had gone bankrupt because of compliance with a mandated benefit statute; and

(6) the insurers produced no credible evidence that the cost-impact of § 47B has forced any policy holder to self-insure or that the trend toward self-insurance is more pronounced in Massachusetts because of § 47B.

(J.S. App. 54a-56a).

The trial court also rejected the insurers' preemption arguments under the NLRA. It found that statutes mandating benefits are no more disruptive to the collective bargaining process than statutes requiring coverage for pregnancy-related disabilities, and that collective bargaining agreements frequently differ from state to state due to differences in state law (J.S. App. 55a).

4. Following entry of an amended final judgment on December 1, 1980, this case has twice been before the Supreme Judicial Court of the Commonwealth (SJC), which has twice rejected the insurance companies' arguments.

In its first opinion, the highest court of the state noted that ERISA's savings clause for state insurance laws was broad enough to permit a reading saving § 47B from preemption. *Atty. Gen.* v. *Travelers Ins. Co.*, 385 Mass. 598 (1982), *vacated and rem'd* ___ U.S. ___, 103 S.Ct. 3563 (1983) (J.S. App. 21a). The SJC held that § 47B was not preempted because of the language of ERISA's preemption and savings clauses and the absence of any conflict between ERISA and § 47B (J.S. App. 22a-25a). On the matter of the NLRA, the court concluded that the statute, as a health regulation implemented through the mechanism of insurance, was saved from preemption by Congress' intent that the NLRA not supersede either local health regulation or state insurance laws within the meaning of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.* (J.S. App. 25a-30a). The court also viewed § 47B as not having an absolute limit restricting unions' and employers' abilities to negotiate the terms of collective bargaining agreements (J.S. App. 31a).

On appeal, this Court vacated the SJC's decision and remanded the case for reconsideration in light of *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890 (1983) (J.S. App. 10a).

On remand, the SJC focused on the ERISA issues to the exclusion of the insurers' renewed NLRA arguments, and again found that ERISA did not preempt § 47B. *Attorney General* v. *Travelers Ins. Co.*, 391 Mass. 730 (1984) (J.S. App. 1a-9a). Considering the issues now in light of *Shaw*, the SJC found significance in the fact that *Shaw* does not address the insurance savings clause in ERISA (J.S. App. 4a). Using *Shaw's* analysis that effect must be given to ERISA's plain language, 103 S. Ct. at 2900, the court reiterated its previous view that in light of the absence of any conflict between ERISA's purposes and the operation of § 47B, and the plain words exempting from preemption "any law of any state which regulates insurance," § 47B should survive (J.S. App. 6a).

The SJC concluded that to read ERISA as preempting § 47B would "read into the statute an intent that is not expressed by plain words or by necessary implication" and would "require an unnaturally narrow reading of the phrase 'any law . . . which regulates insurance. . . .'" (J.S. App. 6a). The court held that § 47B was a "bona fide regulation of insurance" and was "within the spirit, as well as the letter, of the insurance exception to ERISA preemption" and therefore should not be preempted (J.S. App. 7a). It is this conclusion which the insurance companies ask this Court to reverse.

Summary of Argument.

1. Neither the plain language of ERISA, its legislative history, nor its clear purpose support the premise that state statutes regulating the content of insurance policies that may be sold in the state are preempted when applied to insurance policies purchased to provide benefits in employee welfare plans.

By means of ERISA, Congress sought to combat fraud and abuse in pension plan management by requiring extensive disclosure and the application of fiduciary standards to the management of pension funds. To a far lesser extent, but for the same purposes, Congress sought to regulate welfare plans.

When Congress enacted ERISA and broadly preempted state laws relating to pensions and employee welfare plans, Congress specifically saved from preemption state insurance laws. Throughout the development of ERISA, Congress always contemplated the continued regulation of insurance by the states. Congress recognized in ERISA, as it earlier had in the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.*, that state insurance laws constituted a well-developed body of laws which the states had created and enforced and which should not be interfered with by federal legislation. Accordingly, by explicitly exempting state insurance laws from preemption, Congress made a conscious policy decision to allow the states to continue to regulate insurance, including insurance purchased to provide benefits in employee welfare plans.

Section 47B is a state insurance law within the meaning of ERISA's savings clause. Section 47B, which was enacted prior to the enactment of ERISA, lies squarely within the traditional realm of state regulation of insurance enunciated by this Court in *SEC* v. *National Secur., Inc.*, 393 U.S. 453 (1969) because it regulates the terms of the contract between the insured and the insurer, alters the voluntary insurance market and spreads the risk and cost of mental illness among Massachusetts' citizens, thereby ensuring that the benefits of treatment are available at a reasonable cost to all citizens in need.

Finally, the insurers' policy arguments regarding the effect of mandated benefit laws, such as § 47B, on employee benefit plans and insurance are misdirected, overstated and find no support in the record or in the literature of insurance regulation, economics or mental health.

2. Because § 47B is a law which simply requires that all health insurance policies issued in the state provide minimum coverage for health benefits, it does not impact on the collective bargaining process nor interfere in any way with federal labor law policy; hence, given the presumed validity of state laws, it should not be preempted by the NLRA.

The declared policy of Congress in enacting the NLRA was the promotion of the collective bargaining process and the encouragement of labor and management to negotiate their differences in good faith to achieve industrial peace and eliminate obstructions to the free flow of interstate commerce. Preemption of state laws requires a clear conflict with or frustration of this policy. Those state laws which have been preempted by the NLRA have suffered invalidation because they frustrated the federal scheme in some way, either by interfering with the National Labor Relations Board's (NLRB's) ability to referee the collective bargaining process, or by "stacking the deck" in favor of one party over the other by denying a party an economic weapon in the collective bargaining process which Congress meant it to have. As a law which prescribes the types of insurance policies sold in Massachusetts, § 47B falls into neither of these categories of impermissible interference.

The appellants argue that § 47B does not merely regulate the types of health insurance which may be sold in Massachusetts; they maintain that § 47B dictates specific terms which must be contained in collective bargaining agreements, and consequently, that the exercise by the state in compelling the agreements to contain certain terms is a frustration of congressional intent in fashioning federal labor policy. The Commonwealth demonstrates, however, that the argument is fallacious. Nowhere in the federal scheme of labor-management relations is there an indication of congressional intent to permit the practice that the appellants hope to achieve, namely that unions and employers, acting together, may agree to terms in a collective bargaining agreement which employers would otherwise

be prohibited by state law from establishing. Collective bargaining was not intended by Congress to be a refuge for employers and unions from the operation of state laws which they perceive to be burdensome.

Congress has long recognized that states have the right to legislate and protect their citizens' health and their workers' employment conditions. Similarly, Congress has historically deferred to state regulation in the field of insurance. Congressional recognition of state authority in these areas is indicative of its intent to permit the states to continue to so regulate, in spite of any remote effect on labor-management relations.

Argument.

I. As a State Law Regulating the Content of Insurance Policies, § 47B is Not Preempted by ERISA.

A. *Preemption is Not Lightly Inferred, Particularly in an Area of Law Such as Insurance Regulation which has Historically Been a Concern of the States.*

In determining whether § 47B is preempted, "our task is to ascertain Congress' intent in enacting the federal statute at issue." *Shaw* v. *Delta Air Lines, Inc.*, 103 S. Ct. at 2890. A thoughtful examination of ERISA and its legislative history leads inexorably to the conclusion that Congress intended state insurance laws like § 47B to survive preemption. This is so first because "[t]he exercise of federal supremacy is not lightly to be presumed." *New York State Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 413 (1973), quoting *Schwartz* v. *Texas*, 344 U.S. 199, 202-203 (1952).

This black letter proposition is no different with respect to ERISA. Indeed, in *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), the first case construing the preemption language of ERISA, this Court reiterated this basic principle governing preemption in the following terms:

> [p]reemption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.' *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981), quoting *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963). *See, Jones* v. *Rath Packing Co.*, 430 U.S. 519, 526-526 (1977); *Perez* v. *Campbell*, 402 U.S. 637, 649 (1971); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Hines* v. *Davidowitz*, 312 U.S. 52, 61-62 (1941).

Alessi v. *Raybestos-Manhattan Inc.*, 451 U.S. at 522.

This is especially true where, as here, the law sought to be preempted lies in an area such as insurance that Congress has historically left to the states to regulate.

> We start with the assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Jones v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977), quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Insurance law is perhaps the paradigm of such an area, since in the McCarran-Ferguson Act Congress has used its plenary authority to effectively approve what would otherwise amount to discriminatory commercial regulation by the states. *Western & Southern Life Ins. Co.* v. *State Bd. of Equalization*, 451 U.S. 648, 652-653 (1981); *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408 (1946). The Commonwealth submits, therefore, that only the clearest manifestation of a congressional intent

to supersede state insurance laws would support appellants' claim of preemption. No such intent can be inferred in this case.

B. *ERISA was Not Intended to Displace State Laws Governing Insurance and Instead Explicitly Provides for Continued Enforcement of Such Laws.*

1. The Plain Language of the Statute.

The search for manifestations of congressional purpose is unusually easy in this case because the text of the statute itself makes it clear that no intent to preempt state insurance laws exists. As this Court has recently observed in the context of statutory construction, the exercise "must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'n Fly, Inc.* v. *Dollar Park and Fly, Inc.*, ___ U.S. ___, ___, 53 U.S.L.W. 4044, 4046 (Jan. 8, 1985); *Mills Music, Inc.* v. *Snyder*, ___ U.S. ___, ___, 53 U.S.L.W. 4035, 4038 (Jan., 1985). It is to the text of the statute, therefore, that we first turn.

ERISA contains a series of preemption clauses, each of which must be read together to give the entire statute meaning. *E.g., Philbrook* v. *Glodgett*, 421 U.S. 707, 708-719 (1975). Section 514(a), 29 U.S.C. § 1144(a), ERISA's general preemption clause, provides that,

> Except as provided in subsection(b) of this section, the provisions of this subchapter and subchapter III shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

This general rule of preemption is followed by a "savings clause," § 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A), on which the Commonwealth primarily relies in asserting that its statute may operate in the face of ERISA. That clause provides in pertinent part that ERISA shall not relieve any person from compliance with state insurance laws:

> Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

These two clauses are followed by the "deemer clause" which provides:

> Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies, [or] insurance contracts. . . .

29 U.S.C. § 1144(b)(2)(B).[7] Finally, this last clause is further modified by a congressional directive that ERISA is not construed to invalidate other federal legislation:

> Nothing in this subchapter shall be construed to alter, amend, modify invalidate, impair or supersede any law of the United States . . . .

29 U.S.C. § 1144(d).

Conceptually, then, ERISA's general preemption clause is limited by the insurance savings clause. It, in turn, is explicated

[7] The language of the deemer clause constitutes explicit recognition that Congress was aware that insurance regulation included regulation of the "contracts" issued by insurers, as well as the insurers themselves.

by the deemer clause, which serves to limit and define the breadth of the insurance savings clause. By forbidding the states from deeming or considering employee benefit plans to be insurers, Congress expressly stopped the practice of several of the states of regulating employee benefit plans by treating them as insurers.[8]

Congress' express prohibition against considering employee benefit plans to be insurance companies or insurance contracts reveals the breadth of the insurance savings clause because the deemer clause functions as the only explicit limitation in ERISA on the insurance savings clause. It would not be necessary to even insert such a deemer clause, unless the insurance savings clause is extremely broad — so broad that it would otherwise permit the savings clause to swallow up the rule of general preemption and allow the states to directly regulate employee benefit plans through state insurance laws. What these successive provisions mean, therefore, is simply that ERISA permits continued state regulation of insurance, but rejects state regulation of employee benefit plans.[9]

That Congress should choose this path accords with the central premise of the McCarran-Ferguson Act (McCarran Act) that the states are the primary regulators of insurance. 15 U.S.C. §§ 1011 *et seq.* By virtue of Congress' later inclusion in ERISA of the insurance savings clause and its express acknowledgment that ERISA does not alter or supersede existing federal law, 29 U.S.C. § 1144(d), Congress affirmed this basic McCarran-Ferguson principle.

This reading of ERISA's preemption clauses is further buttressed by Congress' express acknowledgment and acceptance of the role of insurance in the ERISA scheme. ERISA, for example, provides that employee benefit plans may provide bene-

[8] *See* historical discussion of state regulation of employee welfare plans at 27-29, *infra*.

[9] Pfennigstorf & Kimball, *Employee Legal Service Plans: Conflicts Between Federal and State Regulation*, 1976 A. B. Found. Research J. 787, 818 (hereinafter Pfennigstorf).

fits "through the purchase of insurance or otherwise." 29 U.S.C. § 1002(1). Read with the "savings" and "deemer clauses," one must conclude that Congress intended continued state regulation of insurance and its concomitant protection of the insureds.[10]

2. The Prior Opinions of this Court Addressing ERISA Preemption Support the Reading of ERISA Advanced by Massachusetts.

In spite of the literal language of ERISA, the insurers assert that ERISA's preemption scheme somehow alters the traditional preemption test. They assert that this Court's two decisions addressing ERISA preemption, *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), and *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 103 S. Ct. 2890 (1983), confirm their view that through ERISA Congress sought to foreclose any non-federal regulation that affects employee benefit plans. But the insurers substantially mischaracterize the holdings and discussions in *Alessi* and *Shaw*. Both cases explicitly confirm that preemption is not favored unless the state law in question is specifically and clearly excluded by ERISA. *Alessi* at 522; *Shaw* at 2905.

Because this case involves state regulation of insurance, *Alessi* does not avail the petitioners. In *Alessi*, this Court struck down a state law which prohibited a practice, "set-off," which ERISA explicitly permits. 451 U.S. at 517-525. Given the clear conflict between the two statutes and the breadth of ERISA's preemption clause, the Court concluded that the operation of ERISA evidenced an unmistakable intent of Congress that the New Jersey statute fall to the Supremacy Clause. Nevertheless, the Court rejected the notion, now advanced by the insurers, that ERISA expresses a congressional desire to

[10] When employee benefit plans supply benefits through the purchase of insurance, the covered employees acquire significant rights under state law against the insurer. *See Wayne Chemical, Inc.* v. *Columbus Agency Service Corp.*, 567 F.2d 692 (7th Cir. 1977).

foreclose any state regulation which relates in any way to employee benefit plans, noting that "[t]he scope of federal concerns, however, is limited by ERISA itself. The statute explicitly preserves state regulation of insurance, banking and securities." 451 U.S. at 523 n.19.

In *Shaw*, this Court considered whether the New York Human Rights Law and Disability Benefits Law fell within any of the specific exceptions in ERISA to the general rules of preemption contained in § 514a, 29 U.S.C. § 1144(a). In construing those statutory provisions this Court followed the plain meaning of the pertinent exemptions from preemption. 103 S.Ct. at 2903, 2905.[11]

In considering the Human Rights Law, the Court first found that it was a law which relates to an employee benefit plan and then proceeded to weigh the effect of an exemption that is not a subject of the case at bar, the exemption contained in § 514(d) providing that § 514(a) shall "not be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States." Section 514(d), 29 U.S.C. § 1144(d). The Court's analysis carefully tracked the language of the exemption and relied heavily on the congressional intent expressed in Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. §§ 2000e *et seq*. Noting the significant role of state laws in the enforcement of Title VII, the Court concluded that complete preemption of the Human Rights Law would disrupt the joint federal-state enforcement scheme contemplated by Title VII and would therefore "modify and impair federal law" within the meaning of § 514(d). 103 S.Ct. at 2903. Thus, the Court found no preemption to the

[11] The Human Rights Law, a comprehensive anti-discrimination statute, was challenged insofar as it mandated employee benefit plans to treat pregnancy the same as other occupational disabilities. The Disability Benefits Law required employers to pay certain benefits to employees unable to work because of non-occupational injuries or illnesses and as amended, mandated the same benefits for pregnancy as for any other disability. The employers in *Shaw* provided their employees with various medical and disability benefits through welfare plans subject to ERISA, but did not provide pregnancy benefits.

extent that the Human Rights Law extended the same substantive protections as Title VII, but found that the Supremacy Clause prohibited its application insofar as the Human Rights Law created substantive rights additional to those provided by Title VII.

In making this ruling, the Court strongly intimated that the reading of the savings clause advanced here by the Commonwealth is correct. The Court compared and contrasted the extremely broad scope of § 514(b), the savings clause relied on by the state, with the narrow exemption worked by § 514(d). In analyzing the Human Rights Law *vis a vis* § 514(d), the Court looked at its precise relationship to Title VII and upheld it only in part. The Court contrasted this piecemeal approach to the general § 514(b) exemption for state banking, insurance and securities laws. *Id*. at 2903-2904.

It is also significant to the arguments advanced by the insurers that the Court acknowledged that while a state may not force an employer to comply with the state disability law as part of its multi-benefit plan, a state may force an employer to maintain a separate disability benefit plan and thereby comply with the Disability Benefits Law:

> In other words, while the state may not require an employer to alter its ERISA plan, it may force the employer to choose between providing disability benefits in a separately administered plan and include the state-mandated benefits in its ERISA plan. If the state is not satisfied that the ERISA plan comports with the requirements of its disability insurance law, it may compel the employer to maintain a separate plan that does comply.

103 S.Ct. at 2905-2906. In other words, the Court noted its approval of a statutory scheme that would indirectly dictate the contents of an ERISA plan and thereby detract from uniformity of multi-state benefit plans.

Thus, despite the insurers' protestations, both *Alessi* and *Shaw* confirm the historic presumption against preemption of state law and counsel adherence to the plain language of ERISA's exceptions to preemption. Equally important, neither *Alessi* nor *Shaw* turned on the application of the savings clause for insurance, the key to this controversy, and each intimated that the section could protect a state law such as § 47B from preemption.

The Commonwealth reads the ERISA preemption scheme as plainly saving § 47B. Such a reading accords with the holding in *Wadsworth* v. *Whaland,* 562 F.2d 70 (1st Cir. 1977), *cert. denied,* 435 U.S. 980 (1978). The *Wadsworth* court recognized that the savings clause reading urged by the insurers renders the savings clause meaningless. *Wadsworth* at 78. In the absence of the savings clause the only state insurance laws that would be preempted by ERISA's general preemption clause would be those that indirectly regulate employee welfare plans. Other insurance laws would not be preempted because they neither relate to nor affect employee benefit plans. As the Solicitor General wrote in his memorandum opposing the grant of *certiorari* in the *Wadsworth* case:

> The court of appeals recognized, however, that Chapter 57 indirectly regulated employee benefit plans (and all other insureds) by limiting the choices available to them if they choose to buy insurance. Because Section 514(b)(2) subjects to preemption even those state laws which indirectly regulate plans, the court of appeals found Chapter 57 would be subject to preemption. At this point, however, Section 514(b)(2)(A) comes into play; that sub-section saves from preemption any state law which 'regulates insurance'. This savings provision would be meaningless unless it saved from preemption state laws regulating insurance which also indirectly regulate employee benefit plans, since no other state law regulating insurance would be subject to preemption under the Act even in the absence of the savings provision. Chapter 57 obviously 'regulates insurance', and thus the court correctly found that Congress intended that law and others like it to remain effective regardless of ERISA's otherwise broad preemption of state laws relating to plans.

Memorandum for the United States As Amicus Curiae, On Petitions For Writs of Certiorari at 6-7, *Wadsworth* v. *Whaland,* 562 F.2d 70 (1st Cir., 1977), *cert. denied,* 435 U.S. 980 (1978). The Commonwealth wholeheartedly agrees with this proposition.

3. The Legislative History Regarding ERISA Preemption.

The appellants reject the Commonwealth's straight-forward reading of the statutory text as being overly simplistic. Their alternative reading of the statute, clumsy as it might be, can only withstand scrutiny if clearly supported by the legislative history, for it finds no support in the statutory language itself. That legislative history, while offering scant information regarding the insurance savings clause, supports the Commonwealth's literal reading of the savings clause. First, even the earliest versions of ERISA contained exceptions from preemption for traditional areas of state concern such as insurance and banking. Second, the changes which were made in the statute as it made its way through Congress do not suggest any narrowing of the scope of the insurance savings clause.

Pre-enactment versions of ERISA in both the House of Representatives and the Senate contained almost identical preemption clauses which were a great deal narrower than the general preemption clause now in ERISA.[12]

Appellants argue that the broadening of the preemption clause by the Conference Committee means that Congress meant to foreclose *any* non-federal regulation of employee benefit plans. (*See* Metropolitan Brief at 14 and 15). But this reading renders the savings clause for insurance meaningless.

[12] *See* § 514(a) of H.R. 2, 93d Cong. 1st Sess. (1973), 120 Cong. Rec. 4742 (1974), and 120 Cong. Rec. 5002 (1974).

Such a reading not only flies in the face of the maxim of statutory construction that no part of a law is superfluous, *United States* v. *Menashe*, 348 U.S. 528 (1955), but also reveals an internal inconsistency in appellants' argument. If, as the insurers argue, the legislative history reveals that all non-federal regulation that relates to employee benefit plans is preempted, why do appellants argue that *certain* state insurance regulations are valid? (*See* Metropolitan Brief at 11).

In fact, the legislative history reveals that by means of the broadened preemption, Congress primarily sought to make clear that states could not regulate or prohibit prepaid legal services plans. Appellants obscure this purpose by shortening the quotes from Senator Williams and Representative Dent that they reproduce in their brief. (*See* Metropolitan Brief at 14-15). For example, Senator Williams really said:

> It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law. *Consistent with this principle, state professional associations acting under the guise of State-enforced professional regulation, should not be able to prevent unions and employers from maintaining the types of employee benefit programs which Congress has authorized — for example, prepaid legal services programs — whether closed or open panel — authorized by Public Law 93-95. . . .*

120 Cong. Rec. 29933 (1974) (emphasis added).[13]

[13] Both Pfennigstorf and Turza agree that the broadened preemption language was a response by Congress to pressure from labor and consumer lobbies who wanted to experiment with prepaid legal service plans and also a reaction to 1974 actions by the American Bar Association relating to participation. *See* Turza & Holloway, *Preemption of State Laws Under ERISA*, 5 Pension Planning & Compliance 361, 365, 458 (1979) (hereinafter Turza); Pfennigstorf at 802-803, 829.

Interestingly enough, the then associate counsel of Appellant Travelers Insurance Company agreed with this view. *See* Okin, *Federal Preemption of State Law Under ERISA: An Examination of the Effects of the Federal Mandate in the Light of Authoritative Precedent Under the Supremacy Clause, the McCarran-Ferguson Act and the Legislative History*, 24 A. of Life Ins. Couns. Proc. 115, 149 (1976).

Likewise, Representative Dent explained that the broadening of ERISA's general preemption clause was intended to prohibit the states from prohibiting prepaid legal service plans. He analogized ERISA's preemption scheme to the preemption scheme in the Health Maintenance Organization Act:

> Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority of the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation. We followed to a large extent the same approach as in Public Law 93-222, 98 statute (414) where the regulation of health maintenance organizations was foreclosed to State authority — Section 113(a).
>
> The conferees, with the narrow exceptions specifically enumerated, applied this principle in its broadest sense to foreclose any non-federal regulation of employee benefit plans. *Thus, the provisions of Section 514 would reach any rule, regulation, practice or decision of any State, subdivision thereof or any agency or instrumentality thereof — including any professional society or association operating under code of law — which would affect any employee benefit plan as described in Section 4(a) and not exempt under Section 4(b).*

120 Cong. Rec. 29197 (1974) (emphasis supplied).[14]

[14] And to leave no doubt as to the meaning of the broadened preemption, Senators Taft, Javits, and Williams engaged in an extended colloquy in which

The HMO preemption scheme prohibits the states from regulating who can be providers of medical services in a health maintenance organization. *See* 42 U.S.C. § 300e-10, U.S. Code Cong. & Ad. News 3057-3058 (1973). Thus, Congressman Dent's analogy makes even clearer that he sought to prevent Congress from creating an ERISA preemption scheme that would allow the states to bar lawyers from participating in prepaid legal services plans.

Obviously, the broadening of the general preemption clause speaks to the breadth of ERISA's general preemptive effect, but to argue, as appellants do, that the broadening somehow narrows and obviates the insurance savings clause is disingenuous at best, and in light of the legislative history, deliberately misleading at worst.

Ordinarily, subsequent legislative history must be viewed cautiously as a barometer of legislative intent in enacting a particular statute. *Consumer Product Safety Comm.* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980). In certain circumstances, however, it can be "virtually conclusive," *Sioux Tribe of Indians* v. *United States*, 316 U.S. 317, 329-330 (1942), and entitled to great weight. *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 381 (1968). This is such an unusual case. Here, events beginning in 1977 and culminating with passage of the ERISA Improvement Act of 1979 shed considerable light on the intent of Congress.

In 1977, Congress, as contemplated by §§ 3021 and 3022 of ERISA, 29 U.S.C. §§ 1221-1222, which established the Joint Pension Task Force, reviewed the effects and desirability of "federal preemption of state and local law with respect to pensions and similar plans." 29 U.S.C. § 1222(a)(5). The resulting study confirms that Congress intended to bar the states from continuing to regulate employee benefit plans but to allow the states to continue to regulate insurance and those

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they each emphasize that the states may not regulate prepaid legal service plans by mandating open or closed panels but may continue to enforce ethical rules. *See* 120 Cong. Rec. S. 15757-S.15758 (daily ed. Aug. 22, 1974).

who sell it. Activity Report of House Comm. On Education and Labor, H.R. Rep. No. 1785, 94th Cong., 2d Sess. 48 (1977).

That Congress viewed insurance as not subject to the federal act is emphasized in the Report by the lengthy discussion of insurance "entrepreneurs" who had begun to market insurance products but claimed that such products were employee benefit plans and therefore sheltered from regulation by state insurance laws.

> It has come to our attention . . . that certain entrepreneurs have undertaken to market insurance products to employers and employees at large, claiming these products to be ERISA covered plans . . . . The entreprenuer will then argue that his enterprise is an ERISA benefit plan which is protected, under ERISA's preemption provision, from state regulation. . . . [T]hese plans are established and maintained by entrepreneurs for the purpose of marketing insurance products or services to others. They are not established or maintained by the appropriate parties to confer ERISA jurisdiction. . . . *They are no more ERISA plans than is any other insurance policy sold to any employee benefit plans. To the extent that such programs fail to meet the definition of 'employee benefit plan' state regulation of them is not preempted by Section 514, even though such state action is barred with respect to the plans which purchase these 'products.'*

Activity Report of House Comm. On Education and Labor, H.R. Rep. No. 1785, 94th Cong., 2d Sess. 48, 49 (1977) (emphasis supplied). Thus, the Oversight Task Force recognized and confirmed the distinction in ERISA so criticized by appellants, namely that states may regulate insurance products purchased by employee welfare plans, but may not regulate the plans themselves. Indeed, the Report went so far as to urge state insurance commissioners "to take appropriate action to prevent the continued wrongful avoidance of proper state regulation of these entities." *Id.*

While the Task Force was completing its work, the First Circuit Court of Appeals decided *Wadsworth* v. *Whaland*, 562 F.2d 70 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978). The rationale underlying the decision was entirely consistent with the Report. Indeed, in his brief to this Court opposing *certiorari*, the Solicitor General articulated the premise now advanced by the Commonwealth in the following terms:

> [t]he fact that the purchaser of insurance is an employee benefit plan is immaterial; Congress did not intend to confer any special exemption or privilege on them as insurance buyers.

Memorandum for the United States as Amicus Curiae On Petitions for Writs of Certiorari at 8, *Wadsworth* v. *Whaland*, 562 F.2d 70 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978).

After this Court denied certiorari in 1978, Congress was promptly confronted with an attempt to overturn the First Circuit's holding that a state mandated benefit law, similar to § 47B, was immune from preemption by virtue of the savings clause. The vehicle for such a change was a proposed redefinition of insurance in 29 U.S.C. § 1144(b)(2)(A):

> A state insurance law which provides that a specific benefit or benefits must be provided or made available by a contract or policy of insurance issued to an employee benefit plan is a law which relates to an employee benefit plan within the meaning of subsection (a), [the general preemption clause], and is not a law which regulates insurance within the meaning of subparagraph (A) [the insurance savings clause].

S. 209, 96th Cong., 1st Sess. § x (1979).

This attempt to amend ERISA failed. *Id. See* U.S. Sen. Comm. on Labor and Human Resources, *The ERISA Improvement Act of 1979: Summary and Analysis of Consideration*, 46, 88 (1979); *see also* 125 Cong. Rec. 931, 937 (1979); and Turza at 465-467.

Under these unique circumstances, the fact that Congress did not amend the insurance savings clause when it knew mandated benefit laws were being sheltered from preemption by virtue of ERISA's savings clause for state insurance laws is "virtually conclusive" evidence of the Commonwealth's view that Congress intended such state regulation to continue. If the appellant insurance companies disagree with the policy underlying that decision, their recourse is again to Congress.

4. The Historical Background — As It Reflects On The Purposes of ERISA.

Nothing in the historical background of ERISA supports a departure from the plain language of the insurance savings clause and its legislative history. ERISA's preeminent purpose is pension regulation.[15] Welfare plans[16] receive much less attention in ERISA.[17] For the same reasons that eventually led Congress to enact ERISA in 1974, Massachusetts and several other states passed laws in the 1950's regulating employee welfare plans and pension plans.[18] Long before ERISA was

[15] The major reason for pension reform was the scandalous loss of pensions due to fraud and abuse by unions and pension trustees. 29 U.S.C. §§ 1301-1309. For a history of pension plan regulation see, S. Rep. No. 127, 93d Cong. (1974), reprinted in U.S. Code Cong. & Ad. News 4838, 4839.

[16] An employee welfare benefit plan is described as one which provides "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability or death . . . whether the benefits are provided *through the purchase of insurance* or otherwise. 29 U.S.C. § 1001 (a)(A) (emphasis supplied).

[17] Welfare plans, for example, are subject to the reporting and disclosure standards of Title I, but exempt from the participation, vesting and funding standards established for pension plans. 29 U.S.C. §§ 1051(1), 1081(a)(1). Most of the legislative history and reports concern pension plans. Pfennigstorf at 791 n.21.

[18] 1958 Mass. Acts. c. 655, codified at Mass. G.L. c. 151D. Chapter 151D was repealed and re-created by 1973 Mass. Acts, c. 1169. *See also* Wis. Stat. § 211.02(1) (1959); Pfennigstorf at 792-793; Turza at 370-371; *Malone* v. *White Motor Corp.*, 435 U.S. 497 (1978).

enacted state insurance laws also provided protection for employees, particularly insofar as they regulated insurance purchased to provide benefits for employee welfare plans.[19]

In addition, several of the states attempted to regulate employee welfare plans through state insurance laws by deeming employee welfare plans to be insurers or insurance companies.[20] One motivation for states to deem employee benefit plans to be insurers was that employers in the 1950's had begun to "self-insure" rather than purchase insurance benefits from commercial insurers in order to obtain substantial savings in the decreased state premium taxes and IRS taxes.[21]

By deeming employee welfare plans to be insurers the states preserved state taxing power,[22] and provided protection to employees. Such state regulation raised the possibility of conflict with existing federal law including the Internal Revenue Code and the Taft-Hartley Act of 1947. Pfennigstorf & Kimball, *Employee Legal Service Plans: Conflicts Between Federal and State Regulation*, 1976 A.B. Found. Research J. 787, 793 (hereinafter Pfennigstorf). It is against this background of scandal and a patchwork of federal and state regulation of welfare and pension plans that Congress enacted ERISA on Labor Day in 1974. And, with knowledge of this patchwork of federal and state regulation, Congress deliberately and explicitly chose

[19] Welfare plans first developed informally as employers occasionally paid the medical and hospital bills of ill workers. In approximately 1910, insurance companies started to sell group insurance plans to employers. Finally, in 1930, Blue Cross and Blue Shield developed, and from that point on broad welfare plans evolved. Turza at 367 n.32.

[20] Turza at 371; Pfennigstorf at 795-796. *See generally* Goetz, *The Regulation of Uninsured Employee Welfare Plans Under State Insurance Laws*, 1967 Wis. L. Rev. 319. This so-called "deeming" is the historical reason that led Congress in ERISA to specifically prohibit such deeming. 29 U.S.C. § 1114(b)(2)(B).

[21] *See* Pfennigstorf at 795; Turza at 371. The appellants ignore the history of self-insurance and the trial court's findings of fact (J.S. App. 55a) and claim that mandating benefits leads to self-insurance. (Metropolitan Brief at 30). In fact, financial interests of employers often argue for self-insurance, and the profit motive of insurers argues against it. *See generally*, 1963 Vol. I *NAIC Proceedings* 76.

[22] *Id.*

to preserve the ability of states to regulate insurance. As demonstrated below, that authority unquestionably includes the power to mandate the policy terms between the insured and the insurer.[23]

C. *Section 47B is a State Insurance Law.*

It remains only to demonstrate that § 47B is a law which regulates insurance within the meaning of ERISA to complete the analysis.

The insurers argue strenuously that § 47B is not a "traditional" insurance law and hence is not protected by the savings clause for state insurance laws. They assert that laws which control the content of insurance policies, such as § 47B, were not what Congress had in mind when it saved state insurance laws from preemption (Metropolitan Brief at 34).

But the insurers' argument is fatally flawed in two basic respects: first, it ignores the long history of this Court's decisions holding that the states may control the content of insurance policies; second, it ignores the absurd result of insurers' argument, that is, the creation of a regulatory vacuum if state insurance laws such as § 47B, and others identical in nature to § 47B, are preempted but not replaced by a federal regime.

[23] It is indisputable that numerous mandated benefit laws, including Massachusetts', existed prior to ERISA's enactment, including in at least seven states statutes that mandated some form of mental illness benefit. *See* Ariz. Rev. Stat. Ann. § 20-1402(4)(b) (West Supp. 1983-1984) (enacted 1971); Conn. Gen. Stat. Ann. § 38-174d (West Supp. 1984) (enacted 1971); Ill. Ann. Stat. c. 73, § 979(7) (Smith-Hurd Supp. 1983-1984) (enacted in 1972); Mass. Gen.Laws c. 175, § 47B (enacted in 1973); Md. Ann. Code art. 48A, § 477E (Michie Supp. 1983) (enacted in 1973); Minn. Stat. Ann. § 62A.149 (West Supp. 1984) (enacted in 1972); 1971 Wis. Laws c. 325 (enacted in 1971). *See also*, Metropolitan Jurisdictional Statement at 8-9 n.5; Brief of Health Insurance Association of America as Amicus Curiae In Support of Jurisdictional Statements in this case at Appendices, September, 1984. Presumably, these and all other insurance laws which control the content of insurance policies would fall to preemption under the insurers' analysis.

1. Mandating Benefits and Controlling the Content of Insurance Policies is a Traditional Function of State Insurance Laws.

In *SEC* v. *National Secur., Inc.*, 393 U.S. 453 (1969), this Court explained that the "core" of insurance regulation consisted of affecting "[t]he relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement. . . . Statutes aimed at protecting or regulating this relationship [between the insurance company and the policyholder], directly or indirectly, are laws regulating the business of insurance." *Id.* at 460. This Court has also held that state insurance commissioners have "full power to prescribe the forms of contracts [and] the terms of protection of the insured." *Hoopeston Canning Co.* v. *Cullen*, 318 U.S. 313, 321 (1943). This Court has also held that the "spreading and underwriting of a policyholder's risk" are the "primary elements" of insurance. *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 211 (1979). Despite this recognition that control of the content of insurance contracts is a traditional part of insurance regulation, insurers argue that "state laws whose purpose and effect is to control plan content" are not insurance laws (Metropolitan Brief at 34). Hence, we delve further into the question of what insurance laws are.

2. Section 47B, Like Myriad State Insurance Laws, Functions to Spread the Risk and Control the Cost of Insurance and Thereby Make Coverage Accessible.

Appellants assert that because § 47B "seek[s] to improve access to mental health care" and "make mental health care more readily available to all state residents," § 47B is not an insurance law, but instead an invalid attempt to control the content of employee benefit plans and destroy the voluntary selection of benefits by employers and employees (Metropolitan Brief at 22-23). In light of the history of state regulation of insurance content and this Court's validation of the same, it is no surprise that the insurers cannot drum up even one

citation for their "content" neutrality and voluntary market arguments.

Massachusetts, for example, has a long history of regulating the content of insurance policies. As early as 1908, Massachusetts prescribed mandatory provisions for insurance policies. *New York Life Ins. Co.* v. *Hardison*, 199 Mass. 190, 85 N.E. 410 (1908). Since 1956, Massachusetts has required all group life insurance policies to include a provision ensuring that any insured who leaves the group shall remain insured by the policy for a certain time period, unless the insured is otherwise entitled to similar benefits. Mass. Gen. Laws c. 175, § 134(4). In 1967, the legislature required that all group health insurance policies contain a similar provision. Mass. Gen. Laws c. 175, § 110D. In the area of automobile insurance, in particular, Massachusetts mandates both the kinds of policies which insurers must offer to sell and the kinds of coverage which insureds must purchase. *See* Mass. Gen. Laws c. 175, §§ 113 *et seq.* There is essentially no voluntary market for automobile insurance in Massachusetts. In 1969, the legislature established specific amounts of compulsory automobile liability insurance, and also required that all automobile insurance policies include coverage for damages caused by uninsured motorists. Mass. Gen. Laws c. 175, §§ 113C, 113L.

Conceptually, there is no distinction between mandatory minimum auto insurance and mandatory minimum mental illness benefits. Even the insurers do not argue that auto insurance is not traditional, yet under their analysis, automobile insurance laws would fall to preemption if auto insurance were offered as a welfare plan benefit. *See California Auto Association* v. *Maloney*, 341 U.S. 105 (1951) (state law upheld requiring insurers to participate in a mandatory assigned risk pool to assure the availability of auto insurance). Such an absurd result highlights the poverty of the insurers' "traditional" and "non-traditional" distinction and the weakness of their content neutrality argument.

Massachusetts is not alone in regulating the content of insurance policies or the relationship between insureds and insurers. In *Wayne Chemical, Inc.* v. *Columbus Agency Service Corp.*,

426 F. Supp. 316 (1977), *aff'd*, 567 F.2d 692 (7th Cir. 1977), the district court, adopting the First Circuit's analysis in *Wadsworth* v. *Whaland*, 562 F.2d 70 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978), upheld a law that imposes on insurers who write health insurance the requirement that insurers extend the major medical coverage of dependents who are disabled at the time they reach the limiting age of the policy. The district court noted that at least twenty-five states had such mandatory benefit laws. *Wayne Chemical, Inc.* v. *Columbus Agency Service Corp.*, 426 F. Supp. at 324 n.8. Under the insurers' analysis, all these mandated benefit laws would fall under the Supremacy Clause.

Yet many of these mandated benefit laws have already withstood judicial scrutiny. In *Insurers' Action Council, Inc.* v. *Markman*, 653 F.2d 344 (8th Cir. 1981), for instance, the Circuit Court upheld a mandated mental health benefits law. Similarly, in *Health Ins. Ass'n of America* v. *Harnett*, 44 N.Y.2d 302, 376 N.E. 2d 1280 (1978), the court sustained a law mandating the provision of maternity benefits based on the clear authority of the state legislature to regulate insurance companies. *See American Family Life Assur. Co.* v. *Commissioner of Ins.*, 388 Mass. 468, 446 N.E.2d 1061 (1983) (validity of Massachusetts regulation controlling the content of insurance policies by banning the sale of policies that provide benefits only for cancer); *see also Blue Cross of Virginia* v. *Commonwealth*, 221 Va. 349, 269 S.E.2d 827 (1980); *American Progressive Life & Health Ins. Co.* v. *Corcoran*, 715 F.2d 784 (2d Cir. 1983); *Wayne Chemical, Inc.* v. *Columbus Agency Service Corp.*, 567 F.2d 692 (7th Cir. 1977); *Wadsworth* v. *Whaland*, 562 F.2d 70 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1980). In addition, the Solicitor General, representing the Department of Labor, has taken the position that mandated benefit laws are not preempted by ERISA. *See* Memorandum of the United States As Amicus Curiae On Petitions For Writs of Certiorari, *Wadsworth* v. *Whaland, supra*. Such virtual unanimity highlights the intellectual bankruptcy of insurers' arguments.

3. The Insurers' Arguments About the Effect of § 47B on Employee Benefit Plan Administration are Fatally Flawed.

Appellants argue that an underlying goal of Congress in ERISA was "to leave the substantive content of employee welfare and pension plans to private determination" (Metropolitan Brief at 27). Insurers also assert that by obviating free choice of benefits and promoting nonuniformity from state to state, mandated benefit laws create disturbing distinctions between insured and uninsured plans — distinctions that Congress did not intend. Insurers also contend that mandated benefit laws increase costs and encourage employee benefit plans to self-insure.

These arguments ignore several facts. First, ERISA itself is notably silent as to the content of welfare plans. Second, there is no evidence that Congress did not intend the distinction between insured and uninsured plans that so troubles appellants. Indeed, as discussed at 24-27, subsequent legislative history makes clear that Congress is cognizant that because of the insurance savings clause, state insurance laws affect and control part of the content of insured plans, while uninsured plans operate without regard to state insurance laws.

The insurers' uniformity argument suffers from one major and quite obviously fatal flaw: the national status-quo, without regard to this case, is that multitudinous nonuniformities from state to state exist in insured employee benefit plans. By accepting state insurance laws, Congress accepted that variations from state to state would exist in employee welfare plans. And, as the trial judge found "there is no credible evidence that [the diversities created by mandated benefit laws] are any more complex or burdensome to interstate commerce than various other diverse multi-state regulatory schemes such as workmen's compensation laws." (J.S. App. 56a.) In addition, this Court in *Shaw* has already upheld an exception to ERISA preemption for state disability laws that also results in national nonuniformity. *Shaw* v. *Delta Airlines, Inc.*, 103 S.Ct. at 2906.

The cost arguments of the insurers actually distort the cost impact of mandated benefit laws. Insurers argue against the express findings of the trial court that mandated benefit laws increase the cost of insurance; The Health Insurance Association of America, Amicus Curiae on Behalf of Appellants, alleges, without citation, a 20% increase in cost (Metropolitan Brief at 23-26); (Brief of Health Insurance Association of America as Amicus Curiae at 7). In fact, by eliminating "adverse selection," mandated benefit laws actually spread the cost of mental illness insurance among all insureds and insurance companies (J.S. App. 50a-51a). Such spreading of the risk and cost is a fundamental purpose of insurance laws in general and mandated benefit laws in particular. *SEC* v. *National Secur., Inc.*, 393 U.S. at 460; (A. 225).

In the same manner, insurers have been notably unable to produce any proof, now or at trial, that mandated benefit laws contribute to the trend toward self-insurance. Several commentators have suggested that the savings in state and federal taxes associated with self-insurance, as well as the obvious savings of insurers' profit margin, are the underlying rationale for the general trend toward self-insurance. *See* Turza & Holloway, *Preemption of State Laws Under ERISA*, 5 J. Pension Planning & Compliance, 361, 371 (1979); Pfennigstorf at 795. While it may be intuitatively attractive to argue that a mandated benefit law encourages self-insurance, insurers simply have no evidence to support such an argument. In any event, such policy arguments should be addressed to Congress, not this Court.[24]

II. Section 47B Is Not Preempted by the NLRA Because it Does Not Conflict with the Policy or Purposes of Federal Labor Law.

The standard for preemption of a state statute by the NLRA is no different from that used to determine preemption of state

[24] Indeed, the trial judge found that there was no credible evidence that the trend toward self-insurance was more pronounced in Massachusetts because of § 47B and that the 'trend' "has permeated various types of insurance mechanisms due to sharply escalating prices for various types of insurance coverage. . . . examples include health, product liability and professional liability insurance" (J.S. App. 55a).

law by ERISA: "the purpose of Congress is the ultimate touchstone." *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978), quoting *Retail Clerks International Association* v. *Schermerhorn*, 375 U.S. 96, 103 (1963). While the standard is the same, the level of guidance given by Congress to determine whether state law is superseded by the NLRA is far less than that provided by Congress in ERISA. *See Brown* v. *Hotel & Restaurant Employees & Bartenders International Union Local 54*, ___ U.S. ___, 104 S. Ct. 3179, 3185 (1984). Unlike ERISA, the NLRA contains no provision whatsoever for how state or, for that matter, federal law interacts with it. *See Garner* v. *Teamsters Union*, 346 U.S. 485, 488 (1953).

What is clear about state law preemption under the NLRA is that Congress did not intend that the states be precluded from continuing to exercise their police powers. *Allen-Bradley Local* v. *Wisconsin Employment Relations*, 315 U.S. 740, 749 (1942). Local regulation will be sustained unless it conflicts with federal law or frustrates the federal scheme. *Malone* v. *White Motor Corp.*, 435 U.S. at 504. This Court has recognized that it "cannot declare preempted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers and unions; *obviously, much of this is left to the states*." *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 289 (1971) (emphasis supplied). Instead, conflict exists when, by virtue of the operation of the state statute, the purpose of the federal act cannot be accomplished. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 n.20 (1941).

The purpose of the NLRA is also abundantly clear. The declared policy of Congress is to encourage the process of collective bargaining between labor and management and thereby to promote the overall design of achieving industrial peace and eliminating obstruction to the free flow of commerce. 29 U.S.C. § 151; *see NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937). It is equally clear that the negative implications of the Commerce Clause have no bearing on state insurance laws. With the McCarran-Ferguson Act, Congress

effectively eliminated such implication. *Western & Southern Life Ins. Co.* v. *State Bd. of Equalization*, 451 U.S. 648, 656 (1981) (Commerce Clause is inapplicable to the business of insurance).

Section 47B, governing only the types of health insurance policies which may be issued in Massachusetts and sold to the general public, which includes labor and management, is an example of a law which is properly left to the police power of the states. It does not conflict with the expressed federal labor law policy and, therefore, withstands the insurers' challenges to its preemption by the NLRA.

A. *Section 47B Is Not Preempted by the NLRA Because it Regulates the Types of Insurance Policies Issued in Massachusetts and Does Not Regulate Substantive Terms of Collective Bargaining Agreements.*

1. Examination of § 47B.

In order to determine whether § 47B is preempted by the NLRA, its purpose and function must be assessed to determine the existence of conflict with the federal law or policy. There can be no question that the Massachusetts legislature adopted § 47B to address problems associated with mental health treatment in the Commonwealth (A. 426-458). Treatment was generally unavailable to those needing it because they could not afford the cost. The treatment which was provided was on a state-subsidized, institutionalized basis and thought by many to be draconian (A. 430-432). Recognizing that the retracted state of the voluntary mental health insurance market due to adverse selection was at the root of the state's mental health treatment problems, the legislature enacted § 47B. It was designed to correct the market, spread the risk of covering so-called "bad risks" to all insurance companies issuing accident and sickness policies, support the financing of community mental health treatment centers across the state, and reduce the number of persons receiving treatment in state mental institutions — all to achieve the ultimate goal of improving mental

health care in the Commonwealth[25] (*see* Statement of the Case, at 2-6 *supra*).

Because the purpose of § 47B is to improve the perceived inadequacies of treatment of mental illness in Massachusetts stemming from the unavailability of adequate benefits coverage and the financial inability of people who needed the coverage to buy it, the function of § 47B is marked by its singular focus on insurance policies and their market. Section 47B is a law of general application which regulates the types of accident and sickness insurance policies that may be issued and sold to anyone in Massachusetts. It requires only that such policies must provide coverage for Massachusetts residents in accordance with the minimum benefits set forth in the statute.[26]

Section 47B is not, by any standard, an attempt to affect the collective bargaining process, nor is it aimed at dictating the substantive terms which must be a part of collective bargaining agreements. *See Massachusetts Nurses Ass'n* v. *Dukakis*, 726 F.2d 41 (1st Cir. 1984). Rather, it implements a broad public policy with respect to treatment of mental illness in the Commonwealth, without concern for the dynamics of labor-management relations. *New York Tel. Co.* v. *New York State Dept. of Labor*, 440 U.S. 519, 534 (1979). The product of collective bargaining, as dictated by the NLRA, remains a function of the relative strengths of the parties to the agreement.

[25] The trial judge found that without enactment of § 47B, the economics of health insurance would make it difficult, if not impossible, to provide effective mental health insurance coverage (J.S. App. 50a); *see* T. McGUIRE, FINANCING PSYCHOTHERAPY, Ballinger Publishing Co. (1981) at 50; Sharfstein, "Dispelling Myths About Mental Health Benefits," Business and Health, Oct., 1984.

[26] As a statute of general application, § 47B must be viewed in light of this Court's repeated acknowledgments that "a congressional intent to deprive the states of their power to enforce such general laws is more difficult to infer than an intent to preempt law directed specifically at concerted activity." *New York Tel. Co.* v. *New York State Dept. of Labor*, 440 U.S. at 544; *Farmer* v. *United Brotherhood of Carpenters & Joiners*, 430 U.S. 290, 302 (1977); *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 194-195 (1978). Indeed, it has been suggested that when a state statute of general application is at stake, the burden to show congressional intent to preempt the state law rests with the party seeking to escape its effects. Cox, *Recent Developments in Federal Labor Law Preemption*, 41 Ohio St. L. J. 277, 293 (1980).

The appellants' claim that § 47B impermissibly imposes conditions on collective bargaining agreements misconstrues the operation of § 47B and its effect. By simply limiting the forms of accident and sickness policies which may be purchased in the Commonwealth, § 47B applies only if insurance is purchased, and even then, the statute imposes its terms on labor and management alike, without in any way favoring or burdening either party. *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477, 490 (1960). The relative strengths of the parties to collective bargaining remain unaffected by § 47B's requirement that all accident and sickness policies issued in the state include the prescribed benefits. Likewise, the multitude of solutions which are possible to settle the parties' differences regarding wages, hours and terms and conditions of employment remain unaffected. The requirements of § 47B, which must be a part of any health insurance plan, are no more a burden on or interference with collective bargaining than state laws requiring that employers contribute to unemployment and workmen's compensation funds, laws prescribing mandatory state holidays, or those dictating payment by employers to employees for time spent at the voting polls or on jury duty. *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379 (1937) (minimum wages); *Mountain Timber Co.* v. *Washington*, 243 U.S. 219 (1917) (workmen's compensation); *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421 (1952), *reh. den.*, 343 U.S. 921 (payment to employees while voting).

Contrary to the actual method of operation of § 47B, the appellants would have this Court believe that § 47B requires collective bargaining agreements themselves to contain certain statutorily prescribed terms. The examination of § 47B's purpose and method of operation makes all too clear, however, just how attenuated § 47B's effect on collective bargaining actually is. As this Court recognized in *Malone*, preemption is required only if "the congressional intent to do so is *implied* from the relevant provisions of the labor statutes." *Malone* v. *White Motor Corp.*, 435 U.S. at 505 (emphasis in original). But there is nothing in the NLRA which, even by implication,

can be said to evidence a congressional intent to preempt a state law which mandates the types of accident and sickness insurance policies which can be issued within a state.

2. Federal Labor Law Preemption.

Without deviating from the preemption standard which presumes the validity of state law unless the purpose of the federal act cannot be accomplished, congressional intent to preempt under the NLRA has historically been implied in matters involving two kinds of state regulation. *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 103 S. Ct. 3172, 3176-3177 (1983). The first covers conduct which is actually or arguably either protected or prohibited by the Act. Such conduct has been found, with some exceptions, to come under the primary jurisdiction of the NLRB and state attempts to regulate or adjudicate it are preempted. *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959). This branch of the preemption analysis is clearly not implied by § 47B, as the NLRA is admittedly silent on the matter of the forms of insurance policies which may be issued in the state.[27]

The second NLRA preemption doctrine covers conduct involving the availability to unions and employers of self-help measures which the state has attempted to regulate or adjudicate, thereby potentially altering the parties' economic relationship, but which Congress intended be left unregulated. *International Ass'n of Machinists & Aerospace Workers* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 147-148 (1976) (*Machinists*). Such state regulation or adjudication is

[27] The exceptions to preemption under this doctrine include state regulation or adjudication over conduct which is of "only peripheral concern to the federal law" or "touches interests deeply rooted in local feeling and responsibility." *Id.* at 243-244. In such cases, the state interest in regulating or adjudicating the conduct in question is balanced against the federal interest in protecting the NLRB's ability to adjudicate controversies committed to it by the Act, *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 103 S. Ct. 3172, 3177 (1983); and one cannot make the "easy inference that Congress intended to deprive the States of their ability to retain jurisdiction over such matters." *Brown* v. *Hotel & Restaurant Employees & Bartenders International Union*, 104 S. Ct. 3179, 3187 (1984).

preempted because it can frustrate effective implementation of the processes prescribed by the NLRA. *Id.* But despite the appellant's mistaken assertions that preemption under the *Machinists* doctrine admits of no exceptions, (*see* Travelers Brief at 11, 26), state regulation is not preempted under the *Machinists* doctrine in instances in which Congress has demonstrated an intent that states are required or permitted to regulate in such areas. *New York Tel. Co.* v. *New York State Dept. of Labor*, 440 U.S. 519; *Brown* v. *Hotel & Restaurant Employees & Bartenders International Union*, 104 S. Ct. 3179; *Malone* v. *White Motor Corp.*, 435 U.S. at 497.[28]

The appellants press a significantly expanded view of preemption under the *Machinists* doctrine by seeking to apply it to § 47B. Relying on an earlier case, *Teamsters Union* v. *Oliver*, 358 U.S. 283 (1959), they maintain that Congress intended that "activity to be left unregulated" include not only the methods or processes by which collective bargaining is undertaken, but also the substantive terms of collective bargaining agreements, and by logical extension, the regulation of employment conditions generally. Yet there is no indication that Congress indeed intended to preempt state activity unrelated to the collective bargaining process, or as appellants have suggested, to permit unions and employers together to agree to collective bargaining terms which, because of state law, employers would be prohibited from establishing unilaterally. Congress demonstrated no intent that the NLRA or the collective bargaining process be used as a refuge by employers seeking to avoid compliance with state laws which they perceive as burdensome or as an engine to override state insurance laws. Cox, *Recent Developments in Federal Labor Law Preemption*, 41 Ohio St. L. J. 277, 297 (1980). Congress' concern in developing federal labor law policy is and always has been with the *process* of establishing the terms and conditions of employment, not in prohibiting state prescriptions of such terms. This Court's decisions reflect that fact.[29]

[28] It is also not preempted in instances in which the *Garmon* exception of protecting interests "deeply rooted in local feeling and responsibility" may be applied by analogy. *New York Tel. Co.* v. *New York State Dept. of Labor*, 440 U.S. at 539-540.

Given Congress' concern only with the methods by which collective bargaining is undertaken, it is clear that this case is not a *Machinists* preemption matter. Cases under that doctrine uniformly involve the use of an economic weapon in the collective bargaining process, as the party against whom the weapon is used seeks to eliminate its availability to the other. *Teamsters, Chauffeurs & Helpers Union* v. *Morton*, 377 U.S. 252 (1964), the first "*Machinists*-type" case, concerned the union's use of secondary boycotting as a means to induce management to come to an agreement with it. The *Machinists* case itself, involved the union's concerted refusal to work overtime. *New York Tel. Co.* involved payment of unemployment compensation benefits to strikers, and *Brown* v. *Hotel and Restaurant Employees* concerned the removal of union representatives from positions of authority within the union. These cases turn on the notion that:

> To sanction state regulation of such economic pressure deemed by the federal Act 'desirabl[y] . . . left for the free play of contending economic forces, . . . is not merely [to fill] a gap by outlaw[ing] what federal law fails to outlaw; it is denying one party to an economic contest a weapon that Congress meant him to have available.'

International Ass'n of Machinists & Aerospace Workers v. *Wisconsin Employment Relations Comm'n*, 427 U.S. at 150, quoting Lesnick, *Preemption Reconsidered: The Apparent Reaffirmation of Garmon*, 72 Col. L. Rev. 469, 478 (1972).

The appellants' preemption analysis is thus limited to *Oliver*. That case, however, involved the validity of a collective bargaining agreement term setting the rates of truck rentals paid to union truck drivers driving their own trucks in light of

[29] As is discussed in the next section of this brief, states have always been free to regulate the terms and conditions of employment within their borders. *See, e.g., De Canas* v. *Bica*, 424 U.S. 351 (1976) (state statute prohibiting employer from knowingly employing an illegal alien, if such employment would have adverse effect on lawful resident workers, is not preempted); *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421 (1952), *reh. den.*, 343 U.S. 921 (state statute requiring employer to pay employees during hours in which employees go to voting polls is constitutional).

Ohio's antitrust law proscribing the setting of such rental rates by collective bargaining. The Court held that the antitrust law could not displace that provision of the bargaining agreement, stating that "there is no room in this [federal labor] scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions." *Oliver*, 358 U.S. at 296. But the *Oliver* holding is distinguishable from the case of § 47B in several significant respects.

First, the Court in *Oliver* was directly concerned with the methods by which the rental rates could be established. *Id.* at 294-295; Cox, *Recent Developments in Federal Labor Law Preemption*, 41 Ohio St. L.J. at 298. Federal labor law prescribed the setting of such rates through collective bargaining, while the state antitrust law prohibited ratesetting in that manner because it amounted to monopolization. Thus, it was the process, not the proscription against requiring certain substantive terms in the agreement, which this Court identified as Congress' chief concern. Second, *Oliver* emphasized that the issue of rental rates was an integral part of the union's wage structure, not a "remote and indirect approach to the subject of wages," *id.* at 294, as is § 47B's effect on the terms and conditions of employment. Third, *Oliver* recognized exceptions to its holding; state law was not to be preempted if Congress did not so intend, *id.* at 296, or if the state regulation was adopted to protect the public's health or safety. *Id.* at 297.[30]

Unlike *Oliver*, § 47B affects neither the collective bargaining process nor the result. It is simply not "a 'state law regulating the relations between employees, their unions, and their employers' as to which the reasons underlying the preemption doctrine have their 'greatest force'." *New York Tel. Co.*, 440 U.S. at 533, quoting *Sears, Roebuck & Co.* v. *San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 193 (1978). Rather, § 47B regulates the types of insurance policies issued in the state and addresses the problems of mental illness and its insurability, without in any way affecting the relative strengths or economic relationships between labor and management. Sound principles of federalism require this Court to sustain its validity. *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. at 522.

[30] As the next section demonstrates, § 47B satisfies both such exceptions.

B. *Section 47B is Not Preempted Because the States May Regulate in Both the Mental Health and Insurance Areas.*

1. a. The State's Authority to Regulate Mental Health and Congress' Federal Policy.

Since the earliest days of the United States Constitution, this Court has recognized that the states have great latitude under their police powers to legislate as to "the protection of lives, limbs, health, comfort and quiet of all persons, and protection of all property within the state." *In re Slaughter-House Cases*, 83 U.S. 36, 62-63 (1873); *Beer Co.* v. *Massachusetts*, 97 U.S. 25, 32 (1878); *Commonwealth* v. *Alger*, 61 Mass. (7 Cush.) 53, 87-88 (1851). The regulation of public health has always been thought to be of particular local concern and responsibility. *Barsky* v. *Board of Regents*, 347 U.S. 442, 449 (1954) ("A state has broad power to establish and enforce standards of conduct within its borders regarding the health of everyone there and such power is a vital part of the states' police power.")

Given Congress' strong deference to the states in matters involving protection of public health, it is not surprising that in developing federal policy regarding mental health treatment, Congress has relied heavily on state activity.[31] Numerous federal laws have been enacted which have funded community mental health treatment centers, encouraged state plans in addressing health treatment problems, and promoted state participation in preventing mental illness generally.[32]

[31] There is an enormous unmet need in the United States for mental health treatment. *See generally*, 41 Archives of General Psychiatry, No. 10 (Oct. 1984). In a report to the National Institute of Mental Health, the authors of one article contained in volume 41 of the Archives of General Psychiatry estimate that 1 in 5 persons suffers from a diagnosable form of mental illness. Robins, *Lifetime Prevalence of Specific Psychiatric Disorders In Three Sites*, 41 Archives of General Psychiatry, 949, 952; *See* Wells, *Cost Sharing and The Demand For Ambulatory Mental Health Services*, Report of Rand Corporation and United States Department of Health and Human Services at 11, Library of Congress No. R. 2960 HHS (1982).

[32] The Community Mental Health Centers Act, P.L. 88-164, 77 Stat. 290, 42 U.S.C. §§ 2681 *et seq.*, was passed in 1963 and originally addressed prob-

Massachusetts, in confronting mental health issues in 1973, acted in conformance with federal policy when it perceived the need for state regulation through insurance. Massachusetts had anticipated congressional action to have taken the form of a national health insurance mandate, but when Congress failed to act, Massachusetts did not hesitate (A. 427). When Congress has been silent on matters it recognizes are within the purview of the states, it has always deferred to state law. *New York Tel. Co.* v. *New York State Dept. of Labor,* 440 U.S. at 544; *Silkwood* v. *Kerr McGee Corp.,* ___ U.S. ___, 104 S. Ct. 615, 623 (1984); *cf. Massachusetts Nurses Ass'n* v. *Dukakis,* 726 F.2d at 44.

There is little doubt that § 47B is a valid exercise of Massachusetts' police power which is consistent with Congress's policy on mental health care and, in effect, an expression of congressional mental health care policy. The Commonwealth has confronted the public health problems associated with mental health treatment by passing an insurance law aimed at ensuring the availability of affordable mental health treatment to everyone in the state. It has promoted the proliferation of community mental health centers in the state, which is a

lems in treating mental retardation and other mentally-related illness and handicaps through the funding of community centers. The thrust of the law was to address treatment problems by coordinated national, state and local action. The funding was extended in 1975, P.L. 94-63, 89 Stat. 309, 42 U.S.C. §§ 2689 *et seq.* and later replaced in 1981 by block grants to the states. P.L. 97-35, 95 Stat. 560 (1981).

The National Health Planning & Resources Development Act of 1974, P.L. 93-641 § 2, 88 Stat. 2226 (1975), 42 U.S.C. §§ 300 k *et seq.*, encouraged the development of a federal policy with respect to health care generally and included extensive state participation in policy development as well. Section 300 k-2(a), subparagraphs (14), (15) & (16) specifically refer to a federal policy to encourage community mental health treatment centers and to promote mental health care.

The act establishing the National Institute of Mental Health (NIMH), P.L. 93-282, 88 Stat. 135 (1974), 42 U.S.C. § 289 k-1, later transferred in 1983 to 42 U.S.C. § 290aa, acknowledges that the mental health field deserves nationwide attention and research to address serious problems in mental health care. Sections 289 k-1(d) and 290aa (3) refer directly to state activity in addressing mental health care problems.

clear policy of Congress. Under the NLRA's preemption standards which recognize states' police powers, *Allen-Bradley Local* v. *Wisconsin Employment Relations Bd.,* 315 U.S. at 749, § 47B should not be overriden.

b. The State's Police Power to Regulate Employment Conditions.

Although, § 47B may involve, in some tangential manner, employee-employer relations, that alone is not inconsistent with the states' police power to regulate employment conditions. In conjunction with the obligation of the states to promote the general and mental health of their citizens, states also have the authority under their police powers to regulate for the protection of their workers' health, notwithstanding an effect on the employment relationship. *De Canas* v. *Bica,* 424 U.S. 351, 356 (1976). The *De Canas* Court cited state child labor laws, minimum and other wage laws, occupational health and safety laws and workmen's compensation laws as examples of traditionally permissible state laws enacted pursuant to the states' police power. *Id.*; *West Coast Hotel Co.* v. *Parrish,* 300 U.S. 379, 393 (1937) ("In dealing with the relation of employer and employee, the [state] Legislature has a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression."); *See also Mountain Timber Co.* v. *Washington,* 243 U.S. 219, 243 (1917) ("a State, in the exercise of its power to pass such legislation [workmen's compensation laws] as reasonably deemed to be necessary to promote the health, safety and general welfare of its people . . . may require that these human losses shall be charged against the industry . . ."). Further, except for conflicts with federal law, there are no limitations on the types of laws which states may enact under their police power that affect the business-labor field; in fact, states are encouraged to function as "laboratories" and to legislate new solutions to problems experienced in that area. They have

> the constitutional authority to experiment with new techniques, are entitled to their own standard of public welfare, and may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided.

Day-Brite Lighting, Inc. v. *Missouri,* 342 U.S. 421, 423 (1952), *reh. den.,* 343 U.S. 921 (state statute requiring employer to pay employee for time spent voting is constitutional).

In adopting § 47B, it cannot be overlooked that the Commonwealth sought to protect the state's working class people; the recognition by the legislature that adequate mental health care was not being given to members of the working population of the state because such treatment was not affordable was one of the principal bases for enacting § 47B (A. 430). The legislature recognized that less serious mental health problems experienced by workers were not being treated, which in turn led to their experiencing physical and medical problems requiring medical treatment and in some cases hospitalization, all of which was potentially avoidable had treatment been available at earlier stages of illness (A. 436). Testimony at trial indicated that mental health problems experienced by working class persons do affect their work productivity (A. 218). It is commonly accepted in the mental health profession that symptoms in working people of decreased work productivity, increased absenteeism, increased industrial accidents, increased filing of grievance complaints, and increased employee turnover very often are examples of symptoms of mental illness (A. 218).[33]

Thus, § 47B is fully consistent with the states' police power to protect the worker within the employment relationship. *De Canas* v. *Bica,* 424 U.S. 351.

[33] See n.4, *supra. See also* Harwood, *Economic Costs to Society of Alcohol and Drug Abuse and Mental Illness,* 1980 (Report submitted to Alcohol, Drug Abuse & Mental Health Administration, Contract #ADM 283-83-002 at 34).

By suggesting that § 47B is preempted by the NLRA, the appellants seek to undercut protections which the state affords workers. If § 47B cannot apply to insurance policies purchased in conformance with collective bargaining agreements, workers who benefit from the NLRA-protected bargaining process may receive fewer mental health benefits than non-union coworkers. Moreover, because non-union workers are often covered by benefit plans agreed to in the context of collective bargaining, the appellants' argument would mean that such non-union workers would not be able to realize the benefits afforded by § 47B. Federal labor law policy cannot be stretched to achieve such absurd results.

2. The States' Right to Legislate in the Area of Insurance; the McCarran-Ferguson Act.

Apart from the states' police power authority to regulate in matters of mental health and employment, Congress has explicitly given the states primacy in the area of insurance regulation. Such congressional deference, codified in the provisions of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, is firm evidence of congressional intent for the states to regulate insurance free from preemption by the NLRA. *See Malone* v. *White Motor Corp.,* 435 U.S. 497; *New York Tel. Co.* v. *New York State Dept. of Labor,* 440 U.S. 519.

Like Metropolitan, Travelers also maintains, however, that § 47B does not regulate the business of insurance within the meaning of the McCarran-Ferguson Act and is therefore preempted. (*See* discussion at 29-32, *supra.*) But there is no doubt that § 47B was enacted for the purpose of regulating the business of insurance. It completely satisfies the definition of the "business of insurance" delineated in the *National Securities, Royal Drug* and *Pireno* cases.[34]

The whole thrust of § 47B is to regulate the types of accident and sickness insurance policies that may be sold in the

[34] *SEC* v. *National Secur., Inc.,* 393 U.S. 453 (1969); *Group Life & Health Ins. Co.* v. *Royal Drug Co., Inc.,* 440 U.S. 205 (1979); *Union Labor Life Ins. Co.* v. *Pireno,* 458 U.S. 119 (1982).

state by requiring policies issued here to contain minimum benefits coverage.[35]

The legislature perceived that to combat the problems in the area of mental health treatment, it was necessary to adjust the mental health insurance market, spread the risk of insuring "bad risks" to all insurance companies offering accident and sickness insurance coverage, and create relationships between insurance companies and policyholders, where, because of the unaffordability of such policies, there had been none before.

But the appellants argue further that, even if § 47B is a law regulating the business of insurance, § 1014 of the McCarran Act exempts the NLRA from § 1012(b) of the Act because under § 1014, the NLRA is a law which "specifically relates to the business of insurance" as that phrase is used in § 1012(b). This novel argument is plainly erroneous because Congress did not intend that the NLRA be construed as a law which "specifically relates to the business of insurance," and the language of § 1014 does not support appellants' contention.

As always, the analysis must begin with the plain language of the statute. Section 1012(b) of the McCarran-Ferguson Act reads in its entirety:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, *unless such Act specifically relates to the business of insurance*: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State Law.

[35] There is no expression in the McCarran Act that a state statute may have only one purpose. Section 47B has the purpose of combatting inadequate mental health care *through* the mechanism of correcting the voluntary mental health insurance market.

15 U.S.C. § 1012(b) (emphasis supplied).

Section 1014 reads in its entirety:

> Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

15 U.S.C. § 1014.

Read together these two sections of the McCarran Act constitute an harmonious whole. State laws regulating the business of insurance, like § 47B, are preempted only when Congress specifically so provides in the federal act. 15 U.S.C. § 1012(b). Moreover, even the laws which Congress has indicated do specifically relate to the business of insurance, such as the Sherman, Clayton and FTC Acts, displace state law only to the extent that the business of insurance is not already regulated by state law. *Id.*

Had Congress intended the result advanced by the appellants, § 1014 could easily have stated that the NLRA, the Fair Labor Standards Act (FLSA), or the Merchant Marine Act (MMA) are acts which "specifically relate to the business of insurance," as that phrase is used in § 1012(b), or Congress could have included them in its list of excepted federal acts in that section. But Congress treated the two sections of the Act differently, establishing that the obvious purpose of § 1014 is to ensure the application of the NLRA, FLSA and MMA to employers engaged in the business of insurance. It is evident that neither the NLRA, FLSA nor MMA are acts which "specifically relate

to the business of insurance," rather, they are laws which regulate labor relations.[36]

The McCarran-Ferguson Act was designed to "assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation," *SEC* v. *National Secur., Inc.*, 393 U.S. at 459, absent congressional action "specifically relat[ing] to the business of insurance". 15 U.S.C. § 1012(b). The pre-existing NLRA was not and has not been deemed to be such federal insurance legislation.

Congress intended by Section 1012(b) that no federal law which related to interstate commerce could be found also to regulate the business of insurance, unless that law *specifically* related to the same. Senator Ferguson, the Act's co-sponsor said:

> If there is on the books of the United States a legislative act which relates to interstate commerce, if the act does not specifically relate to insurance, it would not apply at the present time. Having passed the bill now before the Senate, if Congress should tomorrow pass a law relating to interstate commerce, and should not specifically apply the law to the business of insurance, it would not be an implied repeal of this bill, and this bill would not be affected, because the Congress had not, under subdivision (b), said that the new law specifically applied to insurance. 91 Cong. Rec. 481 (1945).

In harmony with Senator Ferguson's comments, the McCarran-Ferguson Act includes those federal laws which might permis-

[36] While the case law is sparse, it is precisely because the application of the two sections of the statute is so clear. In this case below, for example, the Massachusetts Supreme Judicial Court held, without extended discussion, that the labor relations and employment conditions within insurance companies should not be exempt from the applicability of collective bargaining and minimum wage and hour laws. *Atty. Gen.* v. *Travelers Ins. Co.* (J.S. App. 30a-31a, n.25); *See also John Hancock Mut. Life Ins. Co.* v. *Commissioner of Ins.*, 349 Mass. 390, 398, 308 N.E.2d 516 (1965). The appellants have cited no case which supports their position that because of § 1014, the NLRA overrides state insurance laws (Travelers Brief at 38-45).

sibly have some application to the business of insurance. *See* 91 Cong. Rec. 483 (1945) (statement of Sen. Mahoney). In light of this history, if Congress truly had wanted the full panoply of labor relations statutes to "specifically relate to the business of insurance," and to preclude application of state law, it would have so specified two years later in passing the Labor Management Relations Act (LMRA), 29 U.S.C. §§ 141-187, which contains the NLRA, 29 U.S.C. §§ 151-168, but it did not.

The weakness of appellants' argument is demonstrated by carrying the argument to its logical extreme. If appellants' arguments that the NLRA displaces state regulation of insurance were adopted, then *any* instance in which the collective bargaining process were in some way affected by state insurance regulation would permit avoidance of otherwise permissible state regulation. A collective bargaining agreement which might provide for any type of insurance, including life, health, disability, or automobile, need not respect state laws.

In neither the NLRA nor the McCarran-Ferguson Act did Congress seek to foreclose legitimate state regulation of insurance policies as applied to employment benefit packages. Such matters are well within the sphere of protected state activity for the promotion of public health.

Conclusion.

For the reasons set forth above, the decisions of the Supreme Judicial Court should be affirmed.

Respectfully submitted,

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